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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1859

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, The Greyhound Corporation and Greyhound Lines, Inc. ("Greyhound"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 26, 1980. That judgment and opinion affirmed a judgment of $14,400,000 plus interest from 1973 in favor of Respondent Mt. Hood Stages dba Pacific Trailways ("Mt. Hood") entered by the United States District Court for the District of Oregon.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 1980-1 CCH Trade Cases ¶ 63,206, ... F.2d .....; a copy is attached hereto as Appendix A. The Court of Appeals' order denying Greyhound's

Petition for Rehearing with Suggestion for Rehearing *en Banc* is unreported; a copy is attached as Appendix B. The District Court's unreported memorandum of December 29, 1978, holding that Mt. Hood timely raised its equitable tolling theory, is attached as Appendix C. The District Court's memorandum and order of January 26, 1979, addressing the other issues presented by this petition, is unofficially reported at 1979-1 CCH Trade Cases ¶ 62,446; a copy is attached as Appendix D.

JURISDICTION

The Court of Appeals' judgment was entered on February 26, 1980. A timely Petition for Rehearing with Suggestion for Rehearing *en Banc* was denied on April 23, 1980. (App. B) This Petition is filed within 90 days of that date. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Section 4B of the Clayton Act provides that:

> "Any action to enforce any cause of action under sections 15, 15a or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b.

Section 5(i) of the Clayton Act provides that:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private . . . right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended. . . ." 15 U.S.C. § 16(i).

Mt. Hood did not commence this private antitrust action until July 5, 1968, twenty-five years after its cause of action accrued, and seven and a half years after the jury found it knew of its

claims. (R. I, 2249) Instead, on October 7, 1964, Mt. Hood petitioned the ICC to reopen certain ICC proceedings involving Greyhound's acquisition of several bus companies and to issue a supplemental order under the Interstate Commerce Act. This Court previously held that that proceeding did not toll the statute of limitations under Section 5(i). *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322 (1978). The Court of Appeals has now held that the ICC proceeding nevertheless does toll the statute.

May the specific four-year statute of limitations Congress enacted be set aside whenever a plaintiff, who knows of its antitrust claims, institutes a regulatory proceeding before filing an antitrust lawsuit and the antitrust complaint, if it had timely been filed, would have raised issues within the primary jurisdiction of the agency?

2. The fifth and seventh amendments to the United States Constitution respectively provide in part that:

> "No person shall . . . be deprived of . . . property, without due process of law. . . ."
>
> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

Mt. Hood did not give Greyhound notice of its "equitable tolling" theory until the trial was over and the jury had been discharged.

Is the Court of Appeals' decision that tolling could turn on that court's resolution of disputed facts as to which there was no trial consistent with due process and Greyhound's right to a jury trial?

3. Where a judgment is vacated without instructions as to interest, and later a new judgment is entered, does interest run from the date of entry of the new judgment or from the date of the vacated judgment?

4. Section 4 of the Clayton Act provides in part that a successful antitrust plaintiff shall recover "the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.

Is an antitrust defendant properly charged with paying interest on an award of attorneys' fees which are an element of costs and not damages?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are 15 U.S.C. §§ 15, 15b, and 16(i). The constitutional provisions involved are the fifth and seventh amendments to the Constitution of the United States. Pertinent portions are quoted in the questions presented. They are set out verbatim in Appendix E.

STATEMENT OF THE CASE

This is a private antitrust action brought by Mt. Hood against Greyhound under Section 4 of the Clayton Act, 15 U.S.C. § 15. This is the second time it has been before the Court. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322 (1978).

Mt. Hood and Greyhound Lines, Inc., are motor common carriers of passengers and express, operating under authority from and regulation by the ICC. Greyhound Lines, Inc., is wholly owned by The Greyhound Corporation, a diversified holding company. *See California Parlor Car Tours Co.*, 93 M.C.C. 392 (1963).

Between 1947 and 1954, Greyhound acquired eight bus lines in the western United States. Over Mt. Hood's protests the ICC approved the acquisitions as being in the public interest. (R. 1844, *et seq;* Tr. 2197) Following the ICC's approval, Mt. Hood continuously complained about the way Greyhound was operating the acquired lines (Exs. 197, 215, 297, 303-A), and, on October 7, 1964, it petitioned the ICC under Section 5(10) (formerly 5(9)) of the Interstate Commerce Act, 49 U.S.C. § 5(10), to

reopen the acquisition cases "for further hearing to consider the necessity of attaching certain terms, conditions and limitations to the privileges therein granted. . . ." (R. 1410; *see also* Mt. Hood's amended petition, R. 962) On December 14, 1964, the government filed a petition to intervene, and, in December 1968, the ICC entered a supplemental order modifying its prior orders. (R. 2266; Ex. 426)

Mt. Hood did not file its original complaint in this action until July 5, 1968 (R. 1), and the statute of limitations has been a major issue in the case from the outset. (R. 83, 85, 138-45) Before and during trial Mt. Hood argued that the statute had been tolled by Section 5(i) of the Clayton Act and by fraudulent concealment. But it was not until four months after the trial was over, when faced with Greyhound's motion for judgment N.O.V., that it first revealed its theory of "equitable tolling." (R. 2653-59)

Accordingly, the case was tried only on the issues of alleged violations of Sections 1 and 2 of the Sherman Act, fraudulent concealment and damages; there was no trial of any factual issues relating to equitable tolling because Mt. Hood was still holding that theory in reserve. (*See* R. 3347) The jury returned a liability verdict for Mt. Hood, but found that Mt. Hood knew or should have known of its claims on December 14, 1960, seven and a half years before the complaint was filed. (R. 2249) Nevertheless, the trial court (Judge Goodwin of the Ninth Circuit sitting by designation) awarded Mt. Hood treble damages of $13,146,090 for the twenty-year period from 1953 to 1973, based upon a combination of fraudulent concealment and his interpretation of Section 5(i). (R. 1356, 2249, 2261) The Court of Appeals affirmed, holding that the government's petition to intervene in the ICC proceeding was the "functional equivalent" of a direct action for purposes of Section 5(i). *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 700 (9th Cir. 1977).

This Court unanimously rejected the Ninth Circuit's "functional equivalent" theory and held that the statute had not been tolled under Section 5(i). *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322 (1978). The Court also declined to affirm on the basis of "equitable principles", stating that "[i]t will be for the Court of Appeals, on remand, to determine whether respondent [Mt. Hood] may argue this point and, if so, its merits." 437 U.S. at 337 n.21. The Court of Appeals, in turn, remanded the case to Judge Goodwin. (R. 3334-35)

Judge Goodwin held that this Court's decision had no effect on the judgment. He ruled that the statute of limitations had been tolled during the pendency of the ICC proceeding simply because "the equities preponderate in favor of the plaintiff." (App. D, p. 33) He again combined that equitable tolling with tolling by fraudulent concealment and entered a new judgment of $13,146,090, to which he added attorneys' fees of $1,250,000 for a total of $14,396,090. He further held that interest on the new judgment should run, not from January 26, 1979, the date of its entry, but from May 11, 1973, the date of the judgment that this Court vacated. He also allowed interest on the attorneys' fees award and denied Greyhound's motion for a new trial which argued that the erroneous view of limitations at trial had resulted in a verdict based on time barred events. (R. 3570-71; App. D, pp. 31-32, 35)

The Court of Appeals again affirmed Judge Goodwin's result, but it rejected his subjective rationale for tolling. Instead, it ruled that the statute is tolled whenever an administrative proceeding precedes an antitrust complaint and the complaint, had it been timely filed, would have raised issues within the primary jurisdiction of the agency.[1]

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1. The Court of Appeals also affirmed Judge Goodwin's rulings on the interest questions. It did not reach the new trial issue.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision to Create a New Tolling Doctrine Conflicts with Decisions of This Court and of the Second Circuit and Presents Important Questions Respecting the Administration of the Antitrust Laws in Regulated Industries.

For the second time in this case the Court of Appeals has created an unprecedented and unsound exception to the specific four-year statute of limitations that Congress enacted for antitrust cases. In doing so the Court of Appeals has disregarded the teaching of *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322 (1978), which reaffirmed the principles that the statute of limitations is "a statute of repose" enacted to prevent "undue prolongation of [antitrust] proceedings" and to eliminate "confusion and uncertainty". 437 U.S. at 334, 335. *See* S. 619, 84th Cong., 1st Sess. 6-7 (1955); H.R. 422, 84th Cong., 1st Sess. 8-9 (1955). On these general principles the Court unanimously held that the Court of Appeals' "functional equivalent" standard was inconsistent with Congress' intent and an "unacceptable" approach to the statute of limitations. 437 U.S. at 335.

Nevertheless, the Court of Appeals continues to misunderstand Congress' purpose, and it persists in applying the statute on the basis of its own ad hoc perceptions of "policy". In essence it has again held that Mt. Hood's ICC proceeding and the government's intervention in it were the functional equivalent of an antitrust complaint because they gave Greyhound "adequate notice" of this antitrust case. That decision is more unacceptable than the one this Court unanimously reversed, and for many of the same reasons. Moreover, by holding that the very proceeding this Court held *does not* meet Section 5(i)'s tolling requirements, nevertheless *does* toll the statute, the decision below goes beyond what

Congress provided and is contrary to Congress' intent. *Cf., Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976). This Court should again grant certiorari to eliminate conflicting decisions, to restore essential consistency and predictability in the application of the antitrust laws, and to correct a plainly unsound and unwise decision that will otherwise eviscerate the statute of limitations in countless future antitrust cases.

A. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN CARNATION CO. V. PACIFIC WESTBOUND CONFERENCE, 383 U.S. 213 (1966) AND UNITED STATES V. MICHIGAN NATIONAL CORP., 419 U.S. 1 (1974).

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), this Court reversed a Ninth Circuit decision upholding the dismissal of a private antitrust case that raised issues within the primary jurisdiction of the Federal Maritime Commission.[2] The Court held that the case should have been stayed rather than dismissed because otherwise the statute of limitations might run before the administrative proceedings were completed:

> "But a treble-damage action for past conduct cannot be easily reinstituted at a later time. *Such claims are subject to the Statute of Limitations* and are likely to be barred by the time the Commission acts." 383 U.S. at 223 (emphasis added).

Thus, *Carnation* necessarily holds that an administrative proceeding which is an exercise of the agency's primary jurisdiction does *not* toll the statute of limitations for a subsequent antitrust case raising the same issues and claims. If such a proceeding did toll the statute, the subsequent action would not be "likely to be barred by the time the Commission acts," and *Carnation* would have been decided the other way.

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2. In *Carnation* the issues presented at the administrative hearing "included in general the same matters and claims set forth in Carnation's complaint in this [antitrust] case". *Carnation Co. v. Pacific Westbound Conference*, 336 F.2d 650, 652 (9th Cir. 1964), *rev'd on other grounds*, 383 U.S. 213 (1966).

The opinion below does not and could not deny that *Carnation* says what it plainly says or that its language precludes the result reached in this case.[3] Instead the court below concluded that it was free to disregard *Carnation* because, it says, "[t]here was no issue of limitations or of tolling in [*Carnation*]" and this Court's language was an "unadorned statement" that "was not supported by reasons or citation of authority". (App. A, pp. 18-20)[4] The Court of Appeals is simply wrong; it appears to have completely missed the point of *Carnation.*

Contrary to the opinion below, *Carnation* did involve the statute of limitations. Indeed, in *Carnation,* the Ninth Circuit itself had recognized that dismissal of the antitrust suit pending agency action could result in the action being barred by limitations. It solved that problem by ruling that the exercise of the agency's primary jurisdiction was prerequisite to maintaining the antitrust action, and that therefore the statute would not run during the pendency of the administrative proceedings. 336 F.2d 650, 667 n.32. But this Court rejected that solution and held not only that the antitrust case could be brought prior to the completion of administrative proceedings, but also that the complaint must be

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3. The Court of Appeals does say that tolling is not precluded because *Carnation* states only that the cause of action is "likely" to be barred by the time the agency acts. (App. A, p. 20) But that clearly misreads the opinion. Obviously this Court was referring to the likelihood that four years time would expire so that the statute would run before the agency acted; it was not qualifying its statement that the statute applies to treble damage actions.

4. This statement graphically demonstrates the Court of Appeals' wrongheaded approach to the statute of limitations. It is not necessary for anyone, least of all this Court, to have to adduce "reasons or citation of authority" for the proposition that antitrust damage actions are subject to the statute of limitations. That is what the statute unambiguously states. 15 U.S.C. § 15b.

Moreover, the Court of Appeals' statement that "[n]either limitations nor tolling was mentioned in the petition for certiorari, the opposition, or the briefs on the merits." (App. A. p. 20) is erroneous. *See* Memorandum for Federal Maritime Commission filed in this Court December 10, 1964, at pp. 5-6.

filed to avoid the running of the statute of limitations. 383 U.S. at 223. Thus, this Court's statement that the statute of limitations is likely to run during the pendency of an administrative proceeding is hardly "unadorned". To the contrary, it reflects a considered rejection of the Ninth Circuit's conclusion that the statute does not run during the pendency of an administrative proceeding which is an exercise of the agency's primary jurisdiction.

This Court meant what it said in *Carnation.* In *United States v. Michigan National Corp.,* 419 U.S. 1 (1974), the Court again held that it was error to dismiss an antitrust case pending an agency's exercise of its primary jurisdiction. The basis for the decision was the same as it was in *Carnation:* the plaintiff would be "prejudiced by a dismissal" because the statute of limitations might run before the agency acted. 419 U.S. at 5. Obviously no such prejudice would occur if, as the Court of Appeals has held here, the pendency of an administrative proceeding tolls the statute. The opinion below does not discuss *Michigan National;* it is irreconcilable with both *Michigan National* and *Carnation.*[5]

B. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN JOHNSON V. RAILWAY EXPRESS AGENCY, INC., 421 U.S. 454 (1975) AND ELECTRICAL WORKERS LOCAL 790 V. ROBBINS & MYERS, INC., 429 U.S. 229 (1976) AND WITH THREE DECISIONS OF THE SECOND CIRCUIT.[6]

The decisions of this Court establish that the policies of the statute of limitations can be satisfied only if tolling by reason of a prior proceeding is limited to cases in which the complaint in

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5. It is also irreconcilable with the numerous lower court decisions that correctly interpret and follow *Carnation* and *Michigan National. See, e.g., Laveson v. Trans World Airlines,* 471 F.2d 76, 84 (3d Cir. 1972); *Maddock & Miller, Inc. v. United States Lines,* 365 F.2d 98, 102 (2d Cir. 1966); *Hapag-Lloyd, A.G. v. Levine,* 473 F. Supp. 991, 995-96 (N.D. Ill. 1979).

6. *Smith v. American President Lines, Ltd.,* 571 F.2d 102 (2d Cir. 1978); *Williams v. Walsh,* 558 F.2d 667 (2d Cir. 1977); *Meyer v. Frank,* 550 F.2d 726 (2d Cir.), *cert. denied,* 434 U.S. 830 (1977).

the prior proceeding asserted exactly the same cause of action. The Court of Appeals' decision in this case is inconsistent with every one of those decisions.

The leading case is *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). In *Johnson* this Court rejected the petitioner's contention that the statute of limitations on his race discrimination claim under 42 U.S.C. § 1981 had been tolled by his prior institution of an EEOC proceeding that attacked the same conduct and was a statutory prerequisite to his making the same race discrimination claim under Title VII. The petitioner argued that the statute should be tolled because his timely filing of the EEOC proceeding gave defendant notice of his Section 1981 claims and protection against unfair surprise. 421 U.S. at 467-68 n.14. This Court rejected that argument, explaining that

> "[T]he tolling effect given to the timely prior filings in *American Pipe* and in *Burnett*[7] depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted. This factor was more than a mere abstract or theoretical consideration because the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect." 421 U.S. at 467.

Although petitioner Johnson's two claims attacked the same conduct on the same basic grounds, they arose under different statutes and thus did not meet the requirement that they assert exactly the same cause of action. Tolling was therefore improper because, as the Court reiterated:

> "Only where there is complete identity of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the

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7. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Burnett v. New York Central R.R.*, 380 U.S. 424 (1965), the identical complaints were filed within the limitations period, but could not be prosecuted because of a mistake as to proper venue (*Burnett*) and lack of numerosity for class certification (*American Pipe*).

> influence of the policy of repose inherent in a limitation period." 421 U.S. at 468, n.14.

The Court of Appeals recognizes that this treble damages action for alleged monopolization, attempt to monopolize and restraint of trade does not assert the same cause of action as did Mt. Hood's request under the Interstate Commerce Act for entry of a supplemental order in certain old acquisition proceedings. (App. A, pp. 15-18)[8] Nevertheless, in spite of this Court's clear and twice stated holding in *Johnson,* the Court of Appeals concludes that

> "*Johnson* did *not* hold that an identical cause of action in both proceedings is prerequisite to tolling." (App. A, p. 17) (emphasis added).

On its face the Court of Appeal's conclusion conflicts with *Johnson.* Moreover, the Court of Appeals reaches that conclusion without analyzing or giving any weight to what was at stake in *Johnson* or to the policy basis for that decision. Instead, it scrutinizes the language of the opinion, seizes on the word "necessarily" in the second passage from *Johnson* quoted above, and concludes that this Court meant that tolling might be proper even in the absence of complete identity if the prior proceeding "in fact afford[ed] adequate notice". (App. A, p. 18) That interpretation is both wrong and unwise.

It is wrong because it is inconsistent with *Johnson*'s holding. If this Court had intended to permit a factual inquiry into the "adequacy" of notice in each case, it would have undertaken that

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8. In this, at least, the Court of Appeals is clearly correct. Mt. Hood's ICC proceeding sought relief only under the Interstate Commerce Act, not under the antitrust laws. It asked for entry of a supplemental order in the prior acquisition proceedings to enforce certain representations allegedly made (R. 1410-29; see also amended petition R. 1402, 962-74); it did not and could not seek damages for alleged monopolization, attempted monopolization or restraint of trade. Indeed, the ICC did not and could not enforce or decide issues under the antitrust laws. *McLean Trucking Co. v. United States,* 321 U.S. 67, 79, 86 (1944).

inquiry in *Johnson* itself, which was the strongest possible case for it. In fact, both the petitioner and the dissenting Justices urged the Court to make that inquiry and to find that the notice was adequate because the two proceedings attacked precisely the same conduct as being unlawful under federal antidiscrimination statutes. 421 U.S. at 473-76 (Marshall, J.). But the Court explicitly rejected this approach, 421 U.S. at 467-68 n.14, thereby establishing that tolling cannot turn on whether the prior proceeding in fact afforded "adequate notice." Similarly, in *Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), this Court, following *Johnson*, held that the statute of limitations for Title VII claims was not tolled by a prior grievance proceeding attacking the same conduct because it did not assert "the same statutory claim". 429 U.S. at 238. No inquiry as to the factual adequacy of notice was undertaken or permitted.[9]

The Court of Appeals' interpretation is unwise because it conflicts with the policy basis of *Johnson*. If tolling were to turn on the factual question of whether the prior proceeding gave actual notice of the subsequent antitrust claims, then the application of the statute of limitations in the subsequent lawsuit would depend on evidence and argument over such uncertain issues as what in fact occurred in the prior proceeding and whether those events actually informed the defendant that a lawsuit "might follow." (App. A, p. 14) This case proves the point. The Court of Appeals examined what happened in the prior proceeding and found that

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9. The Second Circuit correctly interprets *Johnson* and *Electrical Workers* and applies the complete identity requirement:

> "Under *Johnson v. Railway Express Agency, Inc., supra,* it may be that the factual question of whether the defendant was in a state of repose [i.e., lacked notice] need be considered only when, as in *Burnett,* the two causes of action are the same. In other cases, an actual state of repose apparently may be presumed: [quoting *Johnson*]." *Meyer v. Frank,* 550 F.2d 726, 730 n.10 (2d Cir), *cert. denied,* 434 U.S. 830, (1977). *Accord, Smith v. American President Lines, Ltd.,* 571 F.2d 102, 109 (2d Cir. 1978); *Williams v. Walsh,* 558 F.2d 667, 675-76 (2d Cir. 1977).

the government's petition to intervene gave Greyhound actual notice of Mt. Hood's subsequent antitrust complaint. (App. A, pp. 12-15) Besides being clearly erroneous,[10] the court's decision permitting tolling to turn on that finding disregards this Court's decisions which hold that litigation over such collateral factual issues cannot occur because it would produce unacceptable uncertainty in the application of the statute of limitations. *See Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322 335-36 (1978); *see also Leh v. General Petroleum Corp.*, 382 U.S. 54, 65 (1965). It was the Court of Appeals' failure to recognize this controlling principle that led to its erroneous adoption of the "functional equivalent" test on the prior appeal. The Court of Appeals has now repeated the error with its "adequate notice" test.

In sum, the Court of Appeals' decision conflicts with this Court's decisions in *Johnson, Electrical Workers, Greyhound* and *Leh,* and with the decisions of the Second Circuit in *Smith v. American President Lines,* 571 F.2d 102 (2d Cir. 1978), *Williams v. Walsh,* 558 F.2d 667 (2d Cir. 1977) and *Meyer v. Frank,* 550 F.2d 726 (2d Cir.), *cert. denied,* 434 U.S. 830 (1977). Resolving

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10. The district court made no finding of fact on the question, and Mt. Hood offered no evidence on it. The only direct evidence was by affidavit on remand, and it proved that Greyhound was not alerted to any antitrust threat. (R. 3397) That evidence is both uncontroverted and plainly sensible. *See* M. Handler, *Antitrust—1978,* 78 Colum. L. Rev. 1363, 1416 (1978) ("the administrative proceeding did not seek millions of dollars in damages and did not put Greyhound on notice of any such claim"). Nevertheless, the Court of Appeals, a reviewing court, dismisses it as "untenable" and finds that Greyhound was given notice of Mt. Hood's antitrust claims by the government's petition to intervene. (App. A, pp. 14-15 n.7) But this Court held that the government's petition was not the "functional equivalent" of an antitrust complaint, 437 U.S. at 335; therefore it did *not* give notice of the antitrust claims. Moreover, the government only *mailed* the petition to Greyhound in Chicago on December 14, 1960, the last possible day. (R. 2274) Obviously it was not received the same day. Finally, the court's finding that Greyhound had notice in 1964 assumes that Greyhound had actual notice of Mt. Hood's intentions before those intentions even existed. (Tr. 3774) Thus the Court of Appeals' finding that "Greyhound was given notice within the four year period required by the Clayton Act" (App. A, pp. 14-15 n.7) is unsupportable.

these conflicts is important because the decision below creates uncertainty as to the meaning of this Court's prior decisions, because it affects numerous other cases involving regulated industries, and because it opens the door to avoiding the statute of limitations any time a plaintiff can argue that the defendant somehow received adequate notice that a lawsuit might follow.

C. THE COURT OF APPEALS' DECISION PRESENTS IMPORTANT QUESTIONS RESPECTING THE ADMINISTRATION OF THE ANTITRUST LAWS IN REGULATED INDUSTRIES.

The Court of Appeals attempts to distinguish *Johnson* on the ground that here there is another federal policy that affects the application of the statute of limitations. It says that a failure to toll the statute would conflict with the purposes of the doctrine of primary jurisdiction because it would interfere with the ICC's opportunity to discharge its functions. (App. A, pp. 16-17) The Court of Appeals is wrong on all counts. In truth, the decision frustrates the purpose of primary jurisdiction and creates unacceptable uncertainty in the application of the statute of limitations.

First, the idea that *Johnson* did not involve competing federal interests is disproved by the *Johnson* opinion itself. This Court held that tolling could not occur despite the fact that the failure to toll the statute was likely to interfere with the congressional interests in conciliation and voluntary compliance which are a part of Title VII. 421 U.S. at 461. If the powerful constitutional and statutory interests in remedying racial discrimination cannot outweigh the statute of limitations, how can the judicially created doctrine of primary jurisdiction do so?

Second, the Court of Appeals' belief that tolling will further the doctrine of primary jurisdiction rests on its conclusion that if Mt. Hood had timely filed its complaint, the action would have raised questions within the ICC's primary jurisdiction and would therefore have been dismissed or stayed pending resort to the agency. (App. A, pp. 9-10) But if that is so, then the timely

filing of the complaint could not possibly have interfered with the ICC's primary jurisdiction because, on the court's own assumption, the antitrust court could have deferred to the agency and the agency would have had the opportunity to discharge its functions.

Moreover, the failure to require Mt. Hood to take the "minimal steps" necessary to preserve its claims, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975), thwarts a proper application of the primary jurisdiction doctrine. The decision below fails to recognize that primary jurisdiction is a doctrine developed to accommodate the sometimes overlapping jurisdictions of agencies and courts, and that, accordingly, what the agency is to decide depends on the issues raised by the complaint. Thus, the Court of Appeals simply assumes that neither the agency, the antitrust court nor the parties can contribute to the accommodation between court and agency or help to make the accommodation efficient and effective. That is wrong.

Unlike *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967), on which the Court of Appeals relies, the filing of a complaint here would not have been a "sheer formality" or a mere "protective suit." (App. A, pp. 11-12)[11] If Mt. Hood had followed the normal procedure and timely filed its complaint, that would, of course, have given Greyhound notice of the claims against it and would have eliminated the limitations issues with which the courts have been grappling for years. But it also would have done much more. It would have delineated the issues before the ICC acted and thus would have permitted the court and both parties to participate in and contribute to the primary jurisdiction process. *See, e.g., J. M. Huber Corp. v. Denman*, 367 F.2d 104,

11. In *Crown Coat* the court was to perform "principally a reviewing function" and the allegations to support a court action for review could not even honestly be made until the administrative decision was rendered. 386 U.S. at 513-15. That is not the situation here. Mt. Hood brought an independent antitrust case and no administrative action was prerequisite to it.

111, 121 (5th Cir. 1966); *Retla Steamship Co. v. Pan Ocean Bulk Carriers, Ltd.*, 1979-2 CCH Trade Cases ¶ 62,819 at 78,753-54 (C.D. Cal. 1979); *Arizona Sand & Rock Co. v. Southern Pacific Co.*, 280 I.C.C. 285 (1951). *See also* Appendix F. At the very least they could have helped to frame in advance the questions for resolution by the agency to assist the antitrust court. *See* S. Ailes, *Some Procedural Problems of Primary Jurisdiction*, 13 ABA Section of Antitrust Law 82, 88 (1958).

Again this case proves the point. Because Mt. Hood proceeded backwards and went to the ICC first, the ICC was never even asked the questions it should have answered to help the antitrust court do its job. (*See* R. 962, 1410) The ICC issued an order that dealt only with the regulatory issues presented to it, not with any antitrust issues, and it made no findings that had any binding effect in the antitrust case. As a result, the antitrust implications of the ICC's order were left to the parties to argue over and the courts to struggle with for nearly 10 years. The decision below now endorses that wasteful and counterproductive procedure and invites more of it.

Third, the decision below creates massive uncertainty and unpredictability in the application of the statute of limitations because it makes tolling turn on the conclusion that if an antitrust complaint had been timely filed, it would have raised issues within an agency's primary jurisdiction. (App. A, pp. 9-10) But that conclusion rests only upon the court's guesses as to what allegations would have been made in a complaint that was never filed, and as to how, nearly 20 years ago, some unknown judge would have ruled on a hypothetical motion to dismiss or stay that hypothetical complaint. That is a surreal approach to the statute of limitations. It is made even more surreal by the fact that the Court of Appeals would answer that unanswerable question principally on the basis of *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973) (App. A, pp. 7-9), a decision which made significant

changes in the primary jurisdiction doctrine a decade *after* the hypothetical complaint would have been filed.[12] It is made still more surreal by the fact that the Court of Appeals' assumptions about the complaint Mt. Hood would have filed are contrary to Mt. Hood's own view of the complaint it finally *did* file. Until after trial when it first disclosed its equitable tolling theory, Mt. Hood contended that it was *not* attacking conduct within the jurisdiction of the ICC, but that its claims were based primarily upon alleged acts,

> ". . . which the ICC has no statutory (or practical) authority to adjudicate, and for which the Commission can afford no remedy. . . . Defendants' practices consist of garden variety antitrust acts of monopolization adjudicated by the federal courts everyday for over half a century. There is nothing novel or unique about the type of allegations presented, and there is nothing which places any of them outside the jurisdiction or competence of the Court." (R. 189-90; 247)[13]

Thus tolling here was held to turn a series of speculations, each compounding the uncertainty of the last, as to how courts twenty years ago would have treated some unknown and unfiled complaint under the uncertain principles of primary jurisdiction. Although the Court of Appeals denies the uncertainty its decision creates by asserting that there is a "well developed body of law [which] provides reasonably specific standards for determining when prior resort to an administrative agency will be required" (App. A, p. 21), that assertion cannot be squared with reality. As this Court has observed:

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12. *See Mississippi Power & Light v. United Gas Pipe Line Co.*, 532 F.2d 412, 418 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); R. Travis, *Primary Jurisdiction: A General Theory and Its Application to the Securities Exchange Act*, 63 Cal. L. Rev. 926 (1975).

13. Also contrary to the Court of Appeals' assumptions (App. A, pp. 9, 17-18) is Mt. Hood's position that to the extent administrative and antitrust remedial jurisdiction do overlap, there exists no "preference" for the administrative remedies. (R. 249) Rather, as Mt. Hood says, it had its choice as to which it could pursue. (R. 250)

> "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *United States v. Western Pacific Railroad,* 352 U.S. 59, 64 (1956).
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> "The controversies within the Court over the appropriateness of [primary jurisdiction] in given situations is well known". *Best v. Humboldt Placer Mining Co.,* 371 U.S. 334, 338 (1963).

Indeed, *Ricci* itself was a five-to-four decision, and in the same term three members of the Court found a four-member majority's failure to require preliminary resort to an administrative agency in another case to be irreconcilable with *Ricci. Otter Tail Power Co. v. United States,* 410 U.S. 366, 391-95 (1973). The fact is that there are few areas of the law as uncertain and unpredictable as that of primary jurisdiction.[14]

By making the application of the statute of limitations turn on the court's speculations about inherently uncertain and hypothetical questions, the decision below is contrary to Congress' intent and contrary to the principles underlying the Court's prior decision in this case. *Greyhound Corp. v. Mt. Hood Stages, Inc.,* 437 U.S. 322, 334-36 (1978).[15]

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14. *See* Appendix F. *See also* S. Robinson, *Antitrust Developments: 1973,* 74 Colum. L. Rev. 163, 178-79 (1974); I P. Areeda & D. Turner, Antitrust Law ¶ 227a (1978); I. Convisser, *Primary Jurisdiction; The Rule and Its Rationalizations,* 65 Yale L. J. 315, 327-28, 336 (1956); W. McGovern, *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction,* 13 ABA Section of Antitrust Law 57 (1958).

15. The decision below creates numerous other uncertainties as well. For example, what kinds of administrative proceedings may toll the statute? Must the eventual plaintiff institute them? Must the eventual defendant be a party to them? Must they involve charges that some law is being violated? If so, what relationship must exist between the antitrust laws and the law involved in the administrative proceedings? Must the conduct involved in the two proceedings be exactly the same? What happens in the event of changes of position during the proceedings or of dismissal by the agency for lack of jurisdiction or on the merits? The answers to these questions are not apparent, and the Court of Appeals has not suggested any.

This Court should review this case to re-establish rules for the application of the statute of limitations that are predictable and that permit the doctrine of primary jurisdiction to be utilized efficiently and effectively.

D. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH EQUITABLE PRINCIPLES.

The question this Court remanded was whether tolling could be justified on the basis of "equitable principles". *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 337 n.21 (1978). The Court of Appeals' decision, however, holds that tolling is proper on grounds that have nothing to do with equity and on facts that are antithetical to equitable principles. Indeed, in response to Greyhound's demonstration of the inequity of tolling in this case, the Court of Appeals says that Mt. Hood's state of mind is irrelevant. (App. A, p. 23) Thus the decision below would allow tolling even if Mt. Hood deliberately delayed filing this action and fraudulently concealed its intention to do so.

The Court of Appeals does say in passing that Mt. Hood did not sleep on its rights and that a failure to toll the statute would "penalize" Mt. Hood. (App. A, pp. 10, 11) But it is undisputed that Mt. Hood knew of its antitrust claims in 1960 and simply failed to assert them for nearly twice as long as the law permits. If that is not sleeping on one's rights, it is difficult to see what is. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975).

Similarly, a failure to toll the statute would not "penalize" Mt. Hood; it would merely impose the normal consequence of failing to file a complaint within the period of limitations. If tolling was improper in *Johnson* where the failure to toll completely eliminated petitioner's Section 1981 remedy for unlawful race discrimination, tolling cannot be justified here where it is not necessary to preserve a statutory remedy but merely extends the damage period by some 11 years and thereby enriches this

corporate plaintiff by an extra several million dollars over and above its existing double recovery.[16] If, as in *Burnett* and *American Pipe,* tolling were necessary to prevent Mt. Hood from being completely out of court without any remedy, one could at least understand why the Court of Appeals might want to decide in favor of tolling. But for the Court of Appeals to struggle as it has against a specific statute, against this Court's contrary decisions and against the important policies of repose and predictability only to increase Mt. Hood's windfall is quite incomprehensible.

II. The Court of Appeals' Decision Deprives Greyhound of Its Constitutional Rights to Due Process and a Jury Trial.

Even if this Court were to concur with the Court of Appeals' unprecedented ruling that tolling can turn on a factual inquiry into the adequacy of notice, it should still review this case to resolve the important constitutional questions of due process and right to trial by jury that the Court of Appeals' opinion raises but does not answer. These questions have never before been presented because tolling has never before been based on an appellate court's findings of fact on questions as to which the defendant had neither notice nor an opportunity to be heard. (pp. 10-15 above)

Greyhound had no notice of or opportunity to be heard on Mt. Hood's equitable tolling theory, because, although the statute of limitations has been a major issue in the case from the outset (R. 83, 85, 138-45), Mt. Hood never raised its equitable tolling theory until four months after trial, when faced with Greyhound's motion for judgment N.O.V. (*See* R. 2653-59) Thus, the equit-

16. The amount of the judgment not directly involved in the tolling issue is nearly *double* the amount of Mt. Hood's loss for the entire period from 1953 through 1973. (R. 2249) Thus, tolling, far from being necessary to preserve Mt. Hood's claim for damages, will only serve to increase its windfall.

able tolling contention fails to appear in any of the five complaints Mt. Hood filed (R. 1, 306, 439, 691, 1015), or in any of Mt. Hood's requests for pretrial rulings (R. 928, 1009-13), or in Mt. Hood's contentions of fact and law (R. 1503, 1523-24), or in the pretrial order (R. 1816-43), and, because it was undisclosed, that contention was not the subject of any pretrial discovery. Mt. Hood's failure to raise this theory earlier was a result of its tactical decision to rely instead upon its other tolling theories (R. 3347)—theories which the jury and this Court rejected.

Despite the failure to afford Greyhound notice and an opportunity to be heard on the equitable tolling theory, the Court of Appeals resolved the disputed questions of fact against Greyhound. For example, it found, as a matter of fact, that "Mt. Hood has not slept on its rights" (App. A, p. 11) and that the ICC proceeding in fact gave Greyhound adequate notice of this antitrust action. (App. A, pp. 12-14) It is fundamentally unfair and a denial of due process to resolve such disputed factual issues against Greyhound without having afforded it notice and an opportunity to be heard, to present evidence and to cross-examine witnesses with respect to them.[17] *Goldberg v. Kelly,* 397 U.S. 254 (1970). *See also Greene v. McElroy,* 360 U.S. 474, 496-97 (1959); *Morgan v. United States,* 304 U.S. 1, 18 (1938). Had Greyhound received notice of Mt. Hood's theory, it would have proved to the jury at trial that the ICC proceeding did not give it notice of this antitrust action and that Mt. Hood did sleep on its rights for seven and a half years. (R. 3376-77). That Greyhound was un-

17. This is not a situation in which an appellate court affirms on an alternative theory where both theories rest on the same facts. Here the equitable tolling theory was held to turn on facts which were wholly irrelevant to any issue involved in the trial. Tolling under Section 5(i) depends on a comparison of the two complaints, *Greyhound Corp. v. Mt. Hood Stages, Inc.,* 437 U.S. 322, 331-32 (1978); the question of the defendant's actual notice of the pendency of a government antitrust proceeding is irrelevent. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 335-38 (1971). Yet that factual question is now held to be central to the new tolling theory.

able to present its case to the jury is due solely to the fact that it had no notice of Mt. Hood's theory until after the trial was over and the jury had been sent home. As this Court has said in another context, the opportunity to be heard "has little reality or worth unless one is informed that the matter is pending. . . ." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Moreover, this action was tried to a jury, and thus Greyhound was entitled to have the jury decide all disputed questions of fact, the resolution of which was necessary to the award of damages. *See Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 684-86 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976). A ruling in Mt. Hood's favor on the equitable tolling theory is a necessary element of Mt. Hood's recovery on its time-barred claims, which comprise some $5,000,000 of the judgment. The disputed questions of fact on which the application of that theory rests should therefore have been resolved by the jury. *Cf. Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 698-99 (9th Cir. 1977), *rev'd on other grounds*, 437 U.S. 322 (1978) (disputed facts concerning fraudulent concealment to be resolved by the jury);[18] *Meeropol v. Nizer*, 417 F. Supp. 1201, 1213 (S.D.N.Y. 1976), *aff'd in part, rev'd in part*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (interposition of "equitable defense" to legal claim). Here the jury did not and could not perform its function because the factual issues were never put to it. The Court of Appeals has usurped the jury's function and has deprived Greyhound of its constitutional right to a jury trial on Mt. Hood's time-barred claims. U.S. Const. Amend. VII.

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18. Fraudulent concealment is simply another form of "equitable" tolling. *See Westinghouse Elec. Corp. v. Pac. Gas & Elec. Co.*, 326 F.2d 575, 576 (9th Cir. 1964).

The Court should grant this petition to determine whether a party has the right to notice and an opportunity to be heard on a theory of recovery that rests on the resolution of disputed questions of fact, and, if so, whether those facts are to be resolved by the jury.

III. The Court of Appeals' Decision Allowing Prejudgment Interest from 1973 Conflicts with This Court's Decision in Briggs v. Pennsylvania Railroad, 334 U.S. 304 (1948) and with Decisions of the Eighth and Tenth Circuits.

The Court of Appeals held that interest on the Third Amended Judgment of January 26, 1979, should run from May 11, 1973, the date of the judgment vacated by this Court. That holding was in error because neither the mandate of this Court nor of the Court of Appeals provided for the award of such interest. *Briggs v. Pennsylvania Railroad,* 334 U.S. 304, 306 (1948); *Ashland Oil, Inc. v. Phillips Petroleum Co.,* 607 F.2d 335, 336 (10th Cir. 1979) (per curiam); *Hysell v. Iowa Public Service Co.,* 559 F.2d 468, 476 (8th Cir. 1977); *Riha v. International Telephone & Telegraph Corp.,* 533 F.2d 1053 (8th Cir. 1976) (per curiam).

The Court of Appeals attempts to justify its decision by dividing the judgment into parts. It suggests that this Court's 1978 decision did not affect the 1964-1973 damage claims, and that therefore *Briggs* does not apply to that portion of the judgment. (App. A, pp. 23-24) But this Court vacated the entire judgment making no such distinction, and there is nothing in the Court's opinion to support that rationale. *Greyhound Corp. v. Mt. Hood Stages, Inc.,* 437 U.S. 322, 337 (1978). As for the conflicting decisions by other courts of appeals, the court below makes no attempt to avoid them. It acknowledges the conflict with *Hysell* and *Riha,* and declines to follow them. (App. A, p. 24)

As to the pre-1964 part of the judgment, the Court of Appeals says that the interest question "is less clear." It offers no excuse for failing to follow *Briggs,* but simply ignores that decision and

effectively orders that interest shall run on a vacated judgment.

The question is one that can arise with great frequency, and the clear conflict in the decided cases should be settled by this Court.[19]

IV. The Court of Appeals' Decision Allowing Interest on the Attorneys' Fees Award Conflicts with the Decision of the Fifth Circuit in Carpa, Inc. v. Ward Foods, Inc., 567 F.2d 1316 (5th Cir. 1978) and Presents an Important Recurring Question in the Administration of the Antitrust Laws.

The judgment in this case includes an award of $1,250,000 in attorneys' fees made pursuant to Section 4 of the Clayton Act which provides that a successful plaintiff shall recover "the cost of suit, including a reasonable attorney's fee". 15 U.S.C. § 15. The district court, without discussing the issue, allowed interest on the attorneys' fee award. (R. 3571) The Court of Appeals, also without analysis, affirmed. (App. A, p. 23, n.10)[20]

The Court of Appeals' decision is in conflict with the decision of the Fifth Circuit in *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978), which did analyze the issue. *Carpa* held that interest is not allowable on attorneys' fees awarded under Section 4 because such an award is an element of costs, not damages. *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1321-23 (5th Cir. 1978). *See Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976); *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 692 (8th Cir. 1966); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 222 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

This Court has never considered the question of whether interest may be allowed on attorneys' fees or other costs awarded under Section 4 of the Clayton Act. The question is obviously one of

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19. The issue also makes a $5,000,000 difference in this case.

20. The Court of Appeals simply cites its prior decision in *Perkins v. Standard Oil Co.*, 487 F.2d 672 (9th Cir. 1973), which assumed the answer to the question although the question was not before it.

recurring importance because it is present in every antitrust case in which a plaintiff prevails and is awarded attorneys' fees or costs.[21] The Court should grant certiorari to settle that question and to eliminate the conflict between the decision below and the Fifth Circuit's decision in *Carpa.*

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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May 23, 1980.

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21. In complex antitrust cases where appeals are common and often protracted the question of interest on attorneys' fees is economically important. In this case alone, the amount that turns on the answer to that question is now approximately $500,000.

Appendix A

Court of Appeals' Opinion

United States Court of Appeals
for the Ninth Circuit

No. 79-4071

MT. HOOD STAGES, INC., doing business as PACIFIC TRAILWAYS,

Plaintiff-Appellee,

v.

THE GREYHOUND CORPORATION and GREYHOUND LINES, INC.

Defendants-Appellants.

[February 26, 1980]

OPINION

Appeal from the United States District Court for the District of Oregon

Before: BROWNING, WRIGHT and KENNEDY, Circuit Judges.

BROWNING, Circuit Judge:

This antitrust case is before us for the third time. On the first appeal we affirmed a judgment for plaintiff on the merits, and held the suit not barred by limitations because the running of the statutory period had been tolled under 15 U.S.C. § 16(*i*). 555 F.2d 687 (9th Cir. 1977). On certiorari the Supreme Court held section 16(i) inapplicable, but remanded for consideration of whether the running of limitations had been tolled under equitable principles. 437 U.S. 322, 337 n.21 (1978). We in turn remanded to the district court. The district court held that running of the

statute of limitations had been tolled during the pendency of related proceedings before the Interstate Commerce Commission. This appeal followed. We affirm.

I.

Between 1947 and 1956 Greyhound acquired a number of bus companies whose routes together encircled the routes of Mt. Hood. On October 7, 1964, Mt. Hood filed a petition with the Commission asking that the acquisition proceedings be reopened, and the orders approving the acquisitions be modified. The United States petitioned to intervene in the Commission proceedings on December 14, 1964, and leave to intervene was subsequently granted. The Commission issued an opinion granting relief in April 1968.

This antitrust suit was filed in July 1968. Mt. Hood was awarded damages for the twenty year period from 1953 to 1973. The period of limitations is four years. 15 U.S.C. § 15b. The jury found Greyhound had fraudulently concealed the antitrust violation from 1953 to December 14, 1960. The trial court ruled that the statute of limitations was tolled during that period. We affirmed this ruling on the prior appeal. 555 F.2d at 698-99. We also held on the prior appeal that under 15 U.S.C. § 16(i) the running of limitations was tolled on December 14, 1964 by the intervention of the United States in the Commission proceeding and remained suspended until the administrative proceeding was completed, after this suit was commenced. 555 F.2d at 699-701. Since the time between the period of fraudulent concealment and the government intervention did not exceed four years, the two tolling periods were "tacked" and Mt. Hood was allowed recovery for the full twenty year damage period extending from 1953 to 1973. 555 F.2d at 698 n.26.

The Supreme Court reversed, holding that intervention by the United States in the Commission proceeding could not be treated

as equivalent to institution by the United States of a civil proceeding to enforce the antitrust laws within the meaning of 15 U.S.C. § 16(i).

The question now before us is whether the pendency of the administrative proceeding initiated by Mt. Hood suspended the running of limitations on Mt. Hood's antitrust action on a basis other than section 16(i).[1] If it did, no part of the damage award is barred.[2]

Whether the time limitation on filing suit under a federal statute is tolled during the pendency of a prior judicial or administrative proceeding depends upon whether permitting the subsequent litigation to proceed will further the purposes of Congress in creating the cause of action and in limiting the period for filing. *Burnett v. New York Central Railroad,* 380 U.S. 424, 426-27 (1965); *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 554-56 (1974). We conclude that tolling the running of limitations serves the important federal interest in accommodating enforcement of the Sherman Act with enforcement of the Interstate Commerce Act, and is not inconsistent with the purposes of the Clayton Act's limitation period.

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1. The issue of equitable tolling was raised for the first time in the district court prior to the first appeal but after trial. Greyhound argues that it would be unfair to consider the issue now because Greyhound was denied an opportunity to try it. We conclude the district court did not abuse its discretion in allowing the issue to be raised. Our reasons rest upon considerations relating to the merits and therefore will be stated after discussion of the merits. *See* III, below.

2. Mt. Hood knew or should have known of its claims on December 14, 1960. The administrative proceeding was initiated on October 7, 1964, less than four years from the date that the statute of limitations began to run on Mt. Hood's claims, and did not terminate until after this suit was filed.

II.

The governing principle is succinctly stated in *Burnett v. New York Central Railroad, supra,* 380 U.S. at 427:

> [T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.
>
> In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act.

A.

We consider first whether tolling would serve the purpose and policies of the antitrust laws and the remedial scheme developed for the enforcement of the rights conferred by those laws.

Tolling the statutory period of limitations would serve the basic purpose of 15 U.S.C. §§ 15 and 26 to secure enforcement of the antitrust laws by encouraging persons injured to bring suit against antitrust violators. But this justification would be present in any private suit under the Act, and if no more were required to toll the running of the period of limitations the provision requiring suit to be filed within a limited period would be meaningless. However, tolling the limitations period pending Mt. Hood's resort to the ICC serves Congressional purpose in a much more precise sense. It contributes to a reasonable accommodation of the ICC's responsibility for furthering the national transportation policy with the responsibility of the courts to effectuate the national antitrust policy.

To effectuate the purposes of the Interstate Commerce Act, Section 5(11) of the Act, 49 U.S.C. § 5(11), expressly exempts from the antitrust laws certain carrier conduct that might otherwise violate those laws. Section 5(11) provides that when one carrier acquires another with the approval of the Commission, the carriers are

"relieved from the operation of the antitrust laws . . . insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

The heart of Mt. Hood's antitrust claim is that Greyhound used the power gained through acquisition of encircling routes for the purpose and with the effect of eliminating Mt. Hood as a competitor. Prior to the acquisitions, Mt. Hood had cooperative traffic arrangements with the acquired companies and a through-bus arrangement with Greyhound. Mt. Hood opposed the acquisitions on the ground that these arrangements would be terminated if Greyhound gained control of the bus companies, and that Greyhound would route passengers around Mt. Hood's shorter routes. Greyhound responded by assuring the Commission that it was not the policy of Greyhound to route passengers over circuitous routes and by representing to the Commission that the arrangements would be continued. Relying upon Greyhound's representations the Commission approved the acquisitions. After encircling Mt. Hood, Greyhound, with the purpose of driving Mt. Hood out of business, did exactly what it represented to the Commission it would not do: Greyhound cancelled the through-bus connection, scheduled connecting services to preclude reasonable connection with Mt. Hood, caused ticket agents to direct traffic over Greyhound's longer routes, and interfered with the distribution of Mt. Hood's schedules and the quotation of its rates and services.

These activities alleged in Mt. Hood's antitrust complaint were directly related to and, indeed, dependent upon, the acquisitions approved by the Commission. A substantial question was therefore raised whether these activities were immunized from the antitrust laws by Section 5(11) of the Interstate Commerce Act.

If, as Greyhound insisted, the conduct underlying Mt. Hood's claim was necessary to carry the acquisitions into effect or to hold, maintain, or operate the routes acquired, the conduct was immune from the antitrust laws under § 5(11). If the practices were not necessary to these purposes there would be no antitrust immunity. *See* 555 F.2d at 688-95.

Whether Greyhound's transportation practices were necessary to carry the acquisitions into effect or hold, maintain or operate the acquired property raised "issues of fact not within the conventional experience of judges"and involved subject matter Congress has given the Commission jurisdiction to regulate. *Far East Conference v. United States,* 342 U.S. 570, 574-75 (1952).[3] Moreover, Mt. Hood's allegations, denied by Greyhound, that the Commission had approved the acquisitions in reliance upon

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3. The Court in *Far East Conference v. United States,* 342 U.S. 570, 574-75 (1952) said:

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

As we noted in our prior opinion:

> Clearly there has been no conflict between the regulatory and antitrust regimes. On the contrary, they have accommodated and supplemented each other. The policies of both have been advanced. There has been initial resort to the Commission for an application of its expertise to the factual issues relevant to whether application of the antitrust laws would be incompatible with regulatory objectives, and the Commission has unqualifiedly indicated that it has not approved and continues to disapprove Greyhound's conduct under regulatory standards applied in light of antitrust principles. 555 F.2d at 692 (citation omitted).

Greyhound's false representations that it would not engage in these very practices, created a dispute only the Commission could resolve, and one that bore directly upon the integrity of the Commission's procedures.

These issues, critical to the question of immunity, were therefore within the primary jurisdiction of the Commission. Accordingly, the resolution of these issues by the Commission was required before a court could address the immunity question. *Chicago Mercantile Exchange v. Deaktor,* 414 U.S. 113 (1973); *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289 (1973); *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (1966); *Far East Conference v. United States, supra. United States Navigation Co. v. Cunard Steamship Co.,* 284 U.S. 474 (1932).

In *Ricci v. Chicago Mercantile Exchange, supra,* as in this case, the resolution of disputed questions of fact relating to transactions and practices Congress had placed within the regulatory jurisdiction of an administrative agency was important in determining whether antitrust immunity attached. The court concluded that because the agency's determination would "be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and regulatory regimes," 409 U.S. at 307, the antitrust suit should be stayed until the administrative agency acted.[4] The considerations that lead the Court in *Ricci* to require

4. Ricci claimed he had been deprived of his membership in the Chicago Mercantile Exchange by a transfer contrary to the rules of the Exchange and in violation of both the Commodity Exchange Act, 7 U.S.C. § 1 et seq., and the Sherman Act, 15 U.S.C. § 1. The court concluded that some membership restraints consistent with Exchange rules were sanctioned by the Commodity Exchange Act and immunized from the antitrust laws; and if transfer of Ricci's membership was contrary to Exchange rules, and thus not sanctioned by the Act, there would be no antitrust immunity. 409 U.S. at 303-04. The Court noted that the Commodity Exchange Commission had jurisdiction to determine whether the transfer of Ricci's membership was consistent with Exchange Rules, and that prior agency determination of this dispute was likely to aid to in deciding whether there was antitrust immunity. Whether the transfer violated the rules and hence the Act raised issues "that should be dealt

a determination by the administrative agency before the antitrust suit could proceed are even more clearly present in this case. In this case, as in *Ricci,* accommodating the purposes of both statutory schemes would have required that the antitrust suit, if filed, be stayed to abide the outcome of the Commission proceeding.

The present case illustrates the wisdom of this course. In the proceeding initiated by Mt. Hood, the Commission found that Greyhound had represented that it would continue the existing cooperative practices with Mt. Hood, that the Commission had

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with in the first instance by those especially familiar with the customs and practices of the industry and of the unique marketplace involved in this case." 409 U.S. at 305. The Court concluded that since these were matters "typically lying at the heart of an administrative agency's task and here they appear to be matters that Congress has placed within the jurisdiction of the Commodity Exchange Commission," the antitrust suit should be stayed until the Commission could act. 409 U.S. at 305-06. The Court reasoned:

> [I]f Ricci's complaint is sustained, the immunity issue will dissolve, whereas if it is rejected and the conduct of the Exchange sanctioned by a valid membership rule, the Court will be in a much better position to determine whether the antitrust action should go forward. Affording the opportunity for administrative action will "prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to [these] particular circumstances."

409 U.S. at 306, *quoting Federal Maritime Bd. v. Isbrandtsen Co.,* 356 U.S. 481, 498-99 (1958). The Court continued:

> We make no claim that the Commission has authority to decide either the question of immunity as such or that any rule of the Exchange takes precedence over antitrust policies. Rather, we simply recognize that Congress has established a specialized agency that would determine either that a membership rule of the Exchange has been violated or that it has been followed. Either judgment would require determination of facts and the interpretation and application of the Act and Exchange rules. And either determination will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regimes: The problem disappears entirely if it is found that there has been a violation of the rule; on the other hand, if it is found that the Exchange has merely followed and enforced its own rules, the antitrust court will be in a position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits.

409 U.S. at 307-08.

relied upon the representations in approving the acquisitions, and that the representations were false. These findings were the basis for our subsequent holding that Greyhound's conduct was not immunized from antitrust liability by section 5(11). We said:

> Since the Commission approved the acquisitions in reliance upon Greyhound's commitment that the conduct underlying the antitrust complaint would not occur if the acquisitions were approved, it can hardly be argued that antitrust immunity for such conduct is "necessary" to enable Greyhound "to carry into effect the transaction so approved . . . and to hold, maintain, and operate any properties and exercise any control . . . acquired through such transaction."

555 F.2d 691.

Prior reference to the administrative agency not only aids the court in reaching a "more intelligent and sensitive judgment" as to antitrust immunity, *Ricci, supra,* 409 U.S. at 308, it also reduces the risk of interference by the court in the performance by the agency of its administrative function. Congress's preference for Commission over judicial action in respect to matters within the regulatory jurisdiction of the Commission is reflected in Section 16 of the Clayton Act, 15 U.S.C. § 26. Section 26 prohibits a private antitrust plaintiff from obtaining injunctive relief against "any common carrier subject to the provisions of the [Interstate Commerce Commission Act] in respect to any matter subject to the regulation, supervision, or jurisdiction of the Interstate Commerce Commission." Since the conduct constituting the antitrust violation in this case was subject to regulation by the Commission, Mt. Hood was barred by Section 26 from filing suit in district court for injunctive relief under the antitrust laws. Mt. Hood could secure an order restraining Greyhound's predatory practices only by petitioning the Commission, as it did.

If Mt. Hood had filed this antitrust suit, whether for damages or for an injunction, prior to the Commission determination that

Greyhound's conduct was not necessary to carry the acquisitions into effect or to hold, maintain, or operate the routes acquired, the court would have been compelled to dismiss or stay the suit pending the necessary administrative determination. *United States v. Michigan National Corp.*, 419 U.S. 1, 4-6 (1974); *Ricci v. Chicago Mercantile Exchange, supra,* 409 U.S. 289 at 302; *Carnation Co. v. Pacific Westbound Conference, supra,* 383 U.S. at 222-24; *Far East Conference v. United States, supra,* 342 U.S. at 576-77. Accommodation of the purposes of the Clayton Act and the Interstate Commerce Act required that the antitrust suit be held in abeyance until the Commission ruled. Congressional purposes under the two statutory regimes would be served by tolling the statute of limitations during the Commission proceeding.

Unless Mt. Hood's failure to file this suit in advance of the administrative determination necessary to the maintenance of the antitrust suit frustrates some purpose of the Clayton Act's statute of limitations, Mt. Hood should not be penalized for proceeding in accordance with the integrated "remedial scheme developed" to accommodate the purposes of the antitrust laws and the Interstate Commerce Act. *See Burnett v. New York Central Railroad, supra,* 380 U.S. at 427.

B.

The primary purpose of a statute of limitations is "to assure fairness to defendants." *Burnett v. New York Central Railroad, supra,* 380 U.S. at 428. "The theory is that even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitations. . . ." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944). Limitations provisions are also designed to relieve the courts "of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett v. New York Central Railroad, supra,* 380 U.S. at 428. Neither purpose requires that Mt. Hood's antitrust claim be barred.

Even if Mt. Hood, as a protective measure, had filed this suit at the same time as it filed its petition to the ICC, Mt. Hood's antitrust claim would not have been tried any sooner than it was. As we have seen, the antitrust suit would have been stayed, or dismissed.[5] Since a Commission finding that Greyhound's conduct was necessary to carry the acquisitions into effect, or to hold, maintain, or operate the acquired routes in all probability would have disposed of Mt. Hood's antitrust claim, it would have been poor judicial economy and a potential waste of the parties' resources to allow the suit to go forward even into the preliminary stages of discovery pending the outcome of the Commission proceeding. As the Supreme Court said in a related context, "Since [the protective suit] would remain quiescent until the administrative decision is rendered, the protective suit would be a sheer formality in any event—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts." *Crown Coat Front Co. v. United States,* 386 U.S. 503, 515 (1967). *See also Northern Metal Co. v. United States,* 350 F.2d 833, 839 (3d Cir. 1965).

Mt. Hood has not slept on its rights; it has pursued its claims diligently. It petitioned the Commission for relief within four years after becoming aware of Greyhound's fraudulently concealed conduct. Promptly after the Commission made the determination that was prerequisite to the maintenance of this suit, Mt. Hood filed this action—long before judicial review of the administrative decision was completed. Mt. Hood's failure to file a protective suit that would have been stayed or dismissed was a technical omission that cannot be realistically equated with lack of diligence by Mt. Hood in pursuing its claims. "Regrettable as

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5. At the time Mt. Hood petitioned the Commission, it was the law of this circuit that a simultaneously filed antitrust suit would have been dismissed. *Carnation Co. v. Pacific Westbound Conference,* 336 F.2d 650, 667 & n.32 (9th Cir. 1964), *rev'd,* 383 U.S. 224 (1966). *See Segal v. AT&T,* 606 F.2d 842, 845 (9th Cir. 1979).

the long delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed." *Order of Railroad Telegraphers v. Railway Express Agency, Inc., supra,* 321 U.S. at 349.

The only possible purpose that could have been served by filing a protective suit within the statutory period was to give Greyhound specific notice of the antitrust claim within that period.[6] But Mt. Hood's claim before the Commission provided Greyhound with notice of Mt. Hood's antitrust claim, in all but the most technical sense. As the Supreme Court and this court noted, 437 U.S. at 326; 555 F.2d at 691, both claims rested upon the same conduct: acquiring encircling routes, canceling the joint through-bus, and directing passengers over Greyhound's circuitous route rather than Mt. Hood's direct route, all with the purpose and effect of eliminating Mt. Hood as a competitor. It is not simply that the two claims arose out of the same set of facts; the administrative petition was so framed as to raise essentially the same contested issues as did the later antitrust suit. Only the emphasis and basis of relevance differed.

Whether Greyhound made false representations to the Commission, whether the Commission relied on these representations, the purpose of Greyhound's conduct, and the effect of that conduct on Mt. Hood were the essential issues of both the Commission proceeding and the antitrust suit. Whether Greyhound made false representations to the Commission was relevant in determining whether the running of limitations on the antitrust suit was tolled by fraudulent concealment, 555 F.2d at 698; the same issue was important to the jurisdiction of the Commission to

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6. Greyhound suggests that prior filing of the antitrust suit "enables the parties and the court to formulate precisely the questions to be referred to and answered by the agency to assist the court." No such notice was required in this case. The Commission could not have decided the questions before it without providing the court the assistance it did in resolving the immunity issue.

reopen the acquisition proceedings, 104 M.C.C. 449 at 475 (1968), and to whether, on the merits, the Commission approval of the acquisitions was vitiated by reliance on the representations, 104 M.C.C. at 462. The Commission's finding that it had relied on Greyhound's false representations in approving the acquisitions was key to our determination that Greyhound's conduct was not immune from the antitrust laws as necessary to carry the acquisitions into effect, or to hold, maintain, or operate the acquired companies, 555 F.2d at 691; whether the Commission relied on Greyhound's misrepresentations was also the central issue in the Commission's determination that continuation of the cooperative practices was a condition of the Commission's approval of the acquisitions, 104 M.C.C. at 461, 463.

The purpose behind Greyhound's cancellation of the joint through-bus and cessation of cooperative practices was crucial to the antitrust court's determination of whether Greyhound had unreasonably restrained trade and attempted to monopolize. Greyhound's motivation was litigated in the Commission proceeding as relevant to whether Greyhound's failure to live up to its representations was justified by changed conditions, as Greyhound contended, or was motivated by a desire to stifle competition and drive Mt. Hood out of business, as Mt. Hood alleged and as the Commission found, 104 M.C.C. at 461.

Finally, although Mt. Hood did not seek damages in the administrative proceeding, the issues of injury and loss were nonetheless litigated. To establish the destructive impact upon competitors of Greyhound's failure to adhere to its representations, and the inconsistency of Greyhound's conduct with national transportation policy, Mt. Hood claimed substantial pecuniary loss by reason of Greyhound's activities, 104 M.C.C. at 469, and adduced detailed evidence as to the injury and extent of the loss. 104 M.C.C. at 487-89, 494.

Greyhound has identified no factual issue in the antitrust proceeding not actually raised in the administrative proceeding. Indeed, in a pre-trial brief Greyhound characterized Mt. Hood's petition to the ICC as alleging "substantially everything which is alleged in its [antitrust] complaint." Greyhound had ample opportunity to prepare its defense before "evidence [had] been lost, memories [had] faded, and witnesses [had] disappeared." *Order of Railroad Telegraphers v. Railway Express Agency, Inc., supra,* 321 U.S. at 349.

Greyhound argues, however, that it was entitled to receive within the period of limitations notice of the specific legal theory by which Mt. Hood would later seek relief. Greyhound points out that even if the issues underlying the antitrust claim were all to be found in the administrative action, the consequences of an antitrust treble damage suit might be different from those of a petition to reopen the acquisition proceedings, and had it known of Mt. Hood's antitrust claims its strategy in the Commission proceeding also might have been different. Assuming the correctness of Greyhound's premise that notice of the claim itself was required, the government's petition for intervention in the administrative proceeding removed any reasonable basis for doubt that an antitrust suit raising common factual issues might follow.[7]

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7. The government's petition to intervene reads in part:

> The allegations of the petition of Mt. Hood Stages, Inc. make a serious charge: that Greyhound has been permitted through the series of acquisitions the Commission approved in these proceedings to extend its system in all directions around Mt. Hood; that Greyhound has now begun to route around Mt. Hood over all Greyhound routes traffic which it used to interchange with Mt. Hood or handle in through buses over shorter and quicker routes and to engage in numerous other acts and practices which as they are described in Mt. Hood's petition (pp. 8-9) have in the aggregate the appearance of a studied effort to force Mt. Hood out of business . . . .
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> * * *
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> Behind the immediate issues before the Commission are further issues of applicability of the antitrust laws. The Commission's approvals of the acquisitions relieved Greyhound and its officials from

The petition pointed out that "[b]ehind the immediate issues before the Commission are further issues of applicability of the antitrust laws." The petition noted that use of economic power gained from Commission approved acquisitions to isolate and destroy a competitor was not immune from the antitrust laws.

Greyhound argues that *Johnson v. Railway Express Agency Inc.*, 421 U.S. 454 (1975) and *Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) "flatly preclude" tolling unless both proceedings involve precisely the same cause of action.

It is true that in *Burnett* and *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), in which tolling was allowed, the earlier and later proceedings were based on a single cause of action; and that in *Johnson* and *Electrical Workers*, in which tolling was denied, the two proceedings arose out of the same facts but were based upon different causes of action created by different statutes. It is also true that in *Johnson* the Supreme Court said that tolling in *American Pipe* and *Burnett* "depended heavily on the fact that [the prior] filings involved exactly the same cause of action subsequently asserted." 421 U.S. at 467. Lack of "complete identity" between the two causes of action was also noted as a reason for denying tolling in *Electrical Workers*, 429 U.S. at 238, n.11.

But *American Pipe* and *Burnett* did not rest upon the identity of the causes of action, and *Johnson* and *Electrical Workers* do not turn upon the absence of such identity. As evidenced by the

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accountability under these laws only to the extent necessary to put the acquisitions into effect. While actions taken to give effect to the acquisitions are completely immune, exercise of economic power the acquisitions conferred so as to isolate and destroy a competitor is not.

The petition was filed on December 14, 1964, one day before four years passed since Mt. Hood knew or should have known of its antitrust claims. *See* note 2, above. Thus Greyhound was given notice within the four year period required by the Clayton Act.

above quotations from the *Burnett* opinion, the result in *American Pipe* and *Burnett* rested upon the Court's conclusion that tolling served the purposes Congress sought to achieve by the substantive statutes and the limitations provisions involved in those cases. The contrary result in *Johnson* and *Electrical Workers* was based upon the Court's conclusion that in those cases the Congressional purpose would not be served by allowing the subsequent proceeding.

In *Johnson* the timely filing of a charge of employment discrimination under § 706 of Title VII of the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. § 2000e-5, was held not to toll the running of the period of limitations borrowed from state law for the filing of suit on the same facts under Section 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981. The Court based its conclusion upon evidence in the legislative history of Title VII establishing that Congress intended the remedy under Title VII to be wholly independent of the remedy under Section 1981. Resort to Title VII procedures was not a prerequisite to a Section 1981 action; Congress had indicated no preference for a prior administrative proceeding.[8] The court also noted that tolling was supported in *American Pipe* and *Burnett,* by the existence in each case of "a substantial body of relevant federal procedural law to guide the decision to toll the limitations period, and significant

8. The Court was satisfied "that Congress did not expect that a § 1981 court action usually would be resorted to only upon completion of the Title VII procedures . . . ." 421 U.S. at 461. The Court noted that "the filing of a Title VII charge and resort to Title VII's administrative machinery are not prerequisites for the institution of a § 1981 action." 421 U.S. at 460. The Court was "disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other . . . ." 421 U.S. at 461. The Court concluded that "the fundamental answer to petitioner's [tolling argument] lies in the fact—presumably a happy one for the civil rights claimant—that Congress has clearly retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII." 421 U.S. at 465-66.

underlying federal policy that would have conflicted with a decision not to suspend the running of the statute." 421 U.S. at 466.

Clearly, Congress did not intend a suit under the antitrust laws to be an independent remedial alternative to a petition to the Commission under § 10 of the Interstate Commerce Act in the circumstances involved here. No injunction could have issued and no damages could have been awarded under the antitrust laws unless and until the Commission exercised its primary jurisdiction under the Interstate Commerce Act. The doctrine of primary jurisdiction provides the "relevant federal procedural law to guide the decision to toll the limitations period". The significant federal policy underlying that doctrine—affording the Commission an opportunity to discharge its functions in the area assigned to it for regulation without interference by courts exercising related jurisdiction under the antitrust laws—"would have conflicted with a decision not to suspend the running" of limitations.

Johnson did not hold that an identical cause of action in both proceedings is prerequisite to tolling. Although the petitioner had argued in *Johnson* that the filing of the Title VII charge "gave the employer notice of the claim of discrimination and an opportunity to protect itself from loss of evidence, and surprise," the Court was "*not at all certain* that a Title VII charge affords the charged party the protection that petitioners suggests." 421 U.S. at 467 n.14 (emphasis added). The court cited as an example *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971), in which it was held that judicial proceedings under Title VII may encompass any charge "reasonably expected to grow out of" the prior complaint to EEOC. The Court continued: "Only when there is complete identity of the cause of action will the protection suggested by petitioner *necessarily* exist . . . ." 421 U.S. at 468 n.14 (emphasis added).

Thus *Johnson* does not preclude tolling even though the subsequent proceeding may not rest upon the identical cause of action where, as here, the prior administrative proceeding is prerequisite to the subsequent lawsuit and does in fact afford adequate notice of the issues upon which a defense should be prepared.

In *Electrical Workers* the Court concluded that the existence and utilization of grievance procedures under a collective bargaining contract did not toll the running of limitations on the filing with EEOC of a charge of employment discrimination under Title VII. The crux of the decision is the same as in *Johnson*: Congress intended the two remedies to be entirely distinct, neither dependent in any respect upon the commencement, progress, or outcome of the other. The court also quoted and applied the language of *Johnson* that sufficient notice would "necessarily exist" only where there was a complete identity of the causes of action. 429 U.S. at n.11. *Electrical Workers* does not bar tolling in this case because the administrative and antitrust proceedings were interdependent and the first afforded complete notice of the factual and legal issues involved in the second.[9]

Nor are we persuaded that we must reject the possibility of tolling in any circumstances because of the unadorned statement in *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 223 (1966), that limitations may run on a treble damage antitrust action during the pendency of an administrative proceeding related to the conduct underlying the antitrust claim. In *Carnation,* the plaintiff asserted that a rate-making agreement had not

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9. Jackson v. Hayakawa, 605 F.2d 1121 (9th Cir. 1979), is distinguishable for the same reasons. Plaintiff claimed that the period of limitations under 42 U.S.C. § 1983 was tolled by an informal administrative proceeding instituted by his department chairman. This court denied tolling, under both federal and state law, because the informal administrative proceeding seeking reinstatement, instituted by someone other than the plaintiff, did not provide notice that the plaintiff would bring a damage action under § 1983 and because the two remedies were wholly independent.

been approved by the Federal Maritime Commission, that the agreement was therefore not exempt from the antitrust laws under Section 15 of the Shipping Act, 46 U.S.C. § 814, and that the agreement constituted a *per se* violation of Section 1 of the Sherman Act. A Commission proceeding was underway to determine whether the challenged agreement existed, and, if so, its relationship with an earlier agreement that had been approved by the Commission. Defendants moved to dismiss the antitrust suit on the ground that the subject matter was within the exclusive jurisdiction of the Commission. The district court granted the motion, and this court affirmed on the ground that the resort to the exclusive preliminary jurisdiction of the Board was required. 336 F.2d 650, 664-67. We expressly reserved the question whether an antitrust suit might follow the administrative determination. 336 F.2d at 667. On certiorari the Supreme Court treated the case as involving only "whether the Shipping Act . . . precludes the application of the antitrust laws to the shipping industry." 383 U.S. at 215. The Court's opinion was devoted almost entirely to this question, which the court answered in the negative.

In a short discussion of the appropriate disposition of the pending antitrust treble damage action, the Court held this court had erred in dismissing the suit, and instead should have stayed it until the administrative proceeding was completed. The court distinguished the dismissal of the antitrust suit in *Far East Conference v. United States,* 342 U.S. 570 (1952) on the ground that plaintiff in that case was seeking only injunctive relief from continuing conduct, and such a suit could be reinstituted if necessary when the administrative proceeding was concluded. The court then continued with the language upon which Greyhound relies: "But a treble damage action for past conduct cannot be easily reinstituted at a later time. Such claims are subject to the Statute of Limitations and are likely to be barred by the time the Commission acts." 383 U.S. at 223.

The Supreme Court's attention was directed to the distinction between a suit for injunctive relief against continuing conduct and a suit for damages for past conduct, and then only in respect to prejudice from dismissal. There was no issue of limitation or of tolling in the case. Neither limitations nor tolling was mentioned in the petition for certiorari, the opposition, or the briefs on the merits. The Supreme Court's statement on this subject was not supported by reasons or citation of authority. Moreover, it is not framed in absolute terms: the statement that a treble damage claim is "likely" to be barred does not preclude the possibility of tolling in an appropriate case.

We do not believe the Supreme Court intended its remark to prevent consideration, in a case where the question is squarely presented, of whether tolling the Clayton Act's statute of limitations while an administrative agency decides determinative issues within its primary jurisdiction should be recognized, where to do so would serve the purposes of Congress reflected in the substantive statutes and would not be inconsistent with the purposes of the limitations provision.

Greyhound's final argument on the merits is that tolling "would be inconsistent with the reasoning of the Supreme Court decision in this case." Greyhound's reference is to the Supreme Court's rejection of our holding that the government's intervention in the Commission proceeding was the "functional equivalent of a direct action" by the United States, 555 F.2d at 700. The Supreme Court noted that because the government might reverse its position in the course of the administrative proceeding it would be impossible to determine until the proceeding was concluded whether the government had in fact challenged the conduct as violative of the antitrust laws, and therefore whether the government's intervention would toll the statute. 437 U.S. at 336.

The Supreme Court concluded that an interpretation of section 16(i) that would produce such a result would be incon-

sistent with the purpose of the 1955 amendments to the Clayton Act to reduce the uncertainty and confusion resulting from the applications of varying state statutes of limitations. 437 U.S. at 335. But the Court's rejection of our proposed interpretation of section 16(i) does not mean that Congress intended to make equitable tolling inapplicable to the antitrust laws. One purpose of all statutes of limitations is to eliminate confusion as to the time suit must be filed; yet the doctrine of equitable tolling continues to co-exist with statutes of limitations. Equitable tolling was an established part of limitations law at the time of the 1955 amendments. *See, e.g., Order of Railroad Telegraphers v. Railway Express Agency Inc.*, 321 U.S. 342 (1944). Nothing in the legislative history suggests that Congress meant to dispense with application of this doctrine under the Clayton Act; it was applied under the Act in *American Pipe*. Moreover, the legislative history of the 1955 amendments reflects a Congressional understanding that the closely related rule that the running of limitations is tolled during periods of fraudulent concealment was to be left undisturbed by the amendments, *see* 101 Cong. Rec. 5129, 5130, 5133 (1955) (remarks of Congressman Celler), and the courts have continued to toll the Clayton Act's limitation provision during periods of fraudulent concealment despite the uncertainty that inevitably results. *See* 555 F.2d at 698 & n.27.

The possibility that the Clayton Act might be tolled pending resort to an administrative agency for a preliminary determination of issues within its primary jurisdiction will not add greatly to the uncertainty as to when suit must be filed. The decision that limitations should be tolled and the extent of the tolling is not based upon an *ad hoc* reaction to the equities of a particular case. A well-developed body of law provides reasonably specific standards for determining when prior resort to an administrative agency will be required, and thus when limitations may be tolled. The duration of tolling is fixed by the duration of the administrative

proceeding, and the claimant cannot delay the filing of suit indefinitely, since the statute of limitations is tolled only when the administrative proceeding is begun. The total period that may elapse from the time the cause of action accrues until suit is filed cannot exceed the period fixed by the statute—here, four years—plus the time during which the running of the period is tolled.

We conclude that purposes of the antitrust laws, the Interstate Commerce Act, and the Clayton Act's statute of limitations will be served by tolling the statute of limitations during Mt. Hood's resort to the ICC.

III.

Mt. Hood first raised the theory that the statute of limitations was tolled under equitable principles in a post-trial brief. Greyhound argues that because it was denied a trial on the factual issues raised by the belatedly tendered theory, the district court erred in entertaining it.

The district court did not abuse its discretion in considering the tolling issue on its merits. The district court could reasonably conclude that Greyhound's claim of prejudice was hollow. In its reply brief in support of its motions for judgment notwithstanding the verdict and for a new trial, Greyhound answered Mt. Hood's equitable tolling claim on the merits without suggesting that it would be prejudiced by a decision on the existing record. Similarly, in its reply brief to this court on the first appeal, and in its briefs on petition for certiorari and on the merits in the Supreme Court, Greyhound again argued against equitable tolling on the merits with no suggestion that the record was inadequate. It was not until remand from the Supreme Court, more than five years after Mt. Hood first raised the theory of equitable tolling, that Greyhound claimed it would be prejudiced by a decision on the equitable tolling issue.

The trial judge allowed the parties to supplement the record to the extent necessary to resolve the merits of the equitable tolling issue. Greyhound produced affidavits of counsel that they were

not aware during the proceedings before the Commission that Mt. Hood would later file an antitrust claim, and had they been aware, they would have followed a different strategy. In view of the specific references in the government's petition to intervene to Greyhound's antitrust liability if Mt. Hood's allegations proved true, however, counsel's claim of surprise was untenable.

Finally, Greyhound asserts that if the equitable tolling theory had been raised at trial, it would have proved that Mt. Hood's officers and attorneys did not in fact delay the filing of suit in reliance upon the doctrine of primary jurisdiction. The relevant question is whether the purposes of the antitrust laws, the limitations provision, and the Interstate Commerce Act would be served by tolling, not whether Mt. Hood invoked the administrative remedy with a subjective realization that they must do so before filing their antitrust claim. *See American Pipe & Construction Co., supra,* 414 U.S. at 551-52.

IV.

The District Court allowed interest on the whole judgment from the date the judgment was originally entered. Greyhound argues that interest should be awarded only from the date of the judgment on remand.

On the first appeal we affirmed the entire judgment. The Supreme Court review was limited to the tolling of the statute of limitations. Review by the Supreme Court did not affect the portion of the judgment reflecting damages incurred during the four years immediately preceding the date suit was filed. There was no limitations question as to this portion of the judgment. Since we affirmed this portion of the judgment, interest runs from the date the judgment was originally entered in the district court. Fed. R. App. P. 37; *Lew Wenzel & Co. v. London Litho Supply Co.,* 563 F.2d 1367 (9th Cir. 1977); *Perkins v. Standard Oil Co.,* 487 F.2d 672, 674 (9th Cir. 1973).[10]

10. *Perkins* also disposes of Greyhound's contention that interest is not allowable on a judgment for attorneys' fees. 487 F.2d at 675.

Greyhound argues that interest cannot be awarded because neither the mandate of this court nor of the Supreme Court provided for an award of interest, *citing, Briggs v. Pennsylanvia Railroad,* 334 U.S. 304 (1948) and *United States v. Hougham,* 301 F.2d 133, 135 (9th Cir. 1962). In neither case was there a basis for recovery of the amount on which interest was sought until the appellate court reversed and remanded for the entry of the judgment. As we said in *Hougham*, it is consistent with the language of 28 U.S.C. § 1961 that "post judgment interest should be calculated from the date of the entry of the judgment in which the money damages, upon which interest is to be computed, were in fact awarded . . . ." 301 F.2d at 135. *See also Lew Wenzel & Co. v. London Litho Supply Co., supra.* If *Hysell v. Iowa Public Service Co.,* 559 F.2d 468, 476 (8th Cir. 1977) and *Riha v. IT&T Corp.,* 533 F.2d 1053 (8th Cir. 1976) are inconsistent with this view, we respectfully decline to follow them.

The dates from which interest should run on the portion of the judgment representing damages incurred during the tolling period is less clear. These damages were included in the original award, and we affirmed on the theory that tolling for the entire period was justified by fraudulent concealment of the claim, and, under section 16(i), by government intervention in the Commission proceedings. The Supreme Court did not agree that section 16(i) provided a basis for tolling limitations. The Court reversed and remanded for consideration of whether tolling was justified on equitable principles. The district court concluded that it was, and we affirm. The judgment remains the same—in the same amount, for the same damages incurred during the same period. The only change is the rationale for tolling for a portion of the period. The present rationale was urged upon the district court before the case went up on appeal, as well as upon this court and upon the Supreme Court. Had the district court, this court, or the Supreme Court rejected tolling under section 16(i) but

sustained it on equitable grounds, the judgment would have been affirmed and interest awarded from the date judgment was originally entered. It is not apparent why it should alter the case that the rationale was first adopted by the district court only on remand after the alternative rationale had been held invalid. The district court ruled correctly, therefore, in allowing interest on the whole judgment from the date of original entry.

AFFIRMED.

Appendix B

Court of Appeals' Order Denying Rehearing

United States Court of Appeals
For the Ninth Circuit

No. 79-4071

MT. HOOD STAGES, INC., doing business as PACIFIC TRAILWAYS,

Plaintiff-Appellee,

v.

THE GREYHOUND CORPORATION and GREYHOUND LINES, INC.,

Defendants-Appellants.

[April 23, 1980]

ORDER

Before: BROWNING, WRIGHT, and KENNEDY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Appendix C

District Court's Memorandum

In the United States District Court
For the District of Oregon

Civ. No. 68-374

MT. HOOD STAGES, INC., doing business as PACIFIC TRAILWAYS,

Plaintiff,

v.

THE GREYHOUND CORPORATION and GREYHOUND LINES, INC.,

Defendants.

[December 29, 1978]

MEMORANDUM

[3468]

Following the remand of this case by the United States Court of Appeals for the Ninth Circuit, on September 7, 1978, and the briefs and argument by the parties, two questions were taken under advisement: (1) whether the equitable tolling claim was raised at such a time and in such a manner as to preserve that issue for decision by this court; and (2) if so, whether the statute of limitations was equitably tolled.

The first question must be answered in the affirmative. Mt. Hood urged the theory of equitable tolling in its brief in opposition to Greyhound's postverdict motion for judgment n.o.v. The Mt. Hood brief thus timely placed in issue this alternative theory for tolling the statute of limitations, and the point was timely answered by Greyhound. The matter, therefore, was before this court early enough so that the court could have ruled on it before the case went up on appeal.

This court did not rule on equitable tolling because it then believed that intervention by the government in the I.C.C. proceedings was the functional equivalent of an independent pro-

ceeding before the I.C.C., commenced by the government, and that the statute of limitations accordingly had been tolled by operation of law (the so-called "5(b) exception"). That view of the law, although affirmed by the Court of Appeals, was reversed by the Supreme Court. The case then was remanded to this court by both levels of appellate courts without prejudice to reexamination of the record to determine whether equitable tolling may have been appropriate.

I am equally satisfied that the record presently before this court is adequate to answer any factual questions that remain to be decided in the equitable tolling issue. [3469]

On the merits, whether equitable tolling should apply in this case to all or part of the period, 1953-1964, the matter becomes more complex. In good conscience, I cannot say that the answer is either obvious or that it may be found lying close to the surface. It appears to be necessary to review parts of the transcript with some care, and to review some of the case law. All this will take time. The question of further delay, economic cost, and inconvenience has been raised by the court on its own motion, and, at an earlier stage, was urged by Mt. Hood.

This case has been in court for more than ten years. A jury, more than five years ago, liquidated the amounts of damages, and broke these amounts down into discrete claims.

The original judgment and the amended judgment were entered in a form of lump sum, but the amended judgment was vacated on appeal to the Supreme Court, because the judgment included damages for a claim barred by the statute of limitations.

Neither the Court of Appeals nor the Supreme Court has found any reason to question the other claim covered by the 1973 judgment; and the claim for damages suffered after July 5, 1964 has now been fully adjudicated and affirmed on appeal.

Pursuant to Fed. R. Civ. P. 54(b), there is more than one claim pending in this action, and there is no just cause for delay.

It is, therefore, the order of the court that judgment upon the separate claim that is no longer in controversy be entered forthwith, in the manner and form set out in the attached document.

The enclosed judgment is computed on the jury verdict for damages for the period July 5, 1964 to March 25, [3470] 1973, in the amount of $2,650,491. Tripled according to law, this claim totals $7,951,473.

The judgment leaves open the reserved questions which are still under advisement, but under Fed. R. Civ. P. 54(b) the computation of the damages found by the jury for the period July 5, 1964 to March 25, 1973 requires no further litigation in any court and no just reason can be found for further delay in the reduction to judgment and payment thereof.

The questions reserved, and which will be ruled upon and disposed of in due course by a supplemental judgment are:

(1) whether the damages (as found by the jury for the period before July 5, 1964) may be recovered in this action by reason of the equitable tolling of the statute of limitations;

(2) whether attorneys fees and costs should be adjusted (up or down) depending upon the terms of the supplemental judgment to be entered hereafter; and

(3) the date or dates from which interest is to run on the enclosed judgment and on any sums included in the supplemental judgment to be entered hereafter.

ALFRED T. GOODWIN
Alfred T. Goodwin
United States Circuit Judge
Sitting by Designation [3471]

Appendix D

District Court's Memorandum and Order

In the United States District Court
for the District of Oregon

Civil No. 68-374

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,

Plaintiff,

v.

THE GREYHOUND CORPORATION and
GREYHOUND LINES, INC.,

Defendants.

[January 26, 1979]

MEMORANDUM AND ORDER

On December 29, 1978, the court filed a Second Amended Judgment under Fed. R. Civ. P. 54(b), but after hearing post-judgment motions, stayed that judgment until further order. Having now concluded that a final judgment should be entered on all remaining issues in the case, I am filing herewith a new judgment, captioned for convenience as a Third Amended Judgment.

The rationale of the new judgment follows:

It will be remembered that in a memorandum filed in this case on December 29, 1978, I reserved the question of equitable tolling. Since that date, additional questions have been noted, particularly a motion for a new trial; the question of adjusting attorney fees; and of fixing the date or dates from which interest should run. [3563]

Taking the easiest question first, I agree with defendant that the matter of adjusting attorney fees up or down should be kept

open until all appeals have been concluded. For the present, the court will reinstate the attorney fee that was fixed and incorporated into the Amended Judgment of December 21, 1973, in the amount of $1,250,000.00. That matter has been through the appeal process and seems now to be final, at least with reference to work done prior to December 21, 1973.

On the question of the running of interest, it is correct to allow interest on the sum of $7,951,473.00 from May 11, 1973, until paid. That sum was liquidated by a judgment upon a jury verdict (special interrogatories), and the substantive legal questions involved in the finality of that verdict have been answered on appeal, or could have been included, if not raised, in former appeals.

I am not persuaded that the interest-date cases cited by either side point clearly to the one perfect answer. The interest question here is in some ways unusual. The defendant questions *Perkins v. Standard Oil Co.*, 487 F.2d 672 (9th Cir. 1973), but it is a decision of this court that is entitled to respect. Moreover, the reasoning of the court in *Ohio Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), makes sense when applied to this case, even though the two cases can, of course, be distinguished. The proper purpose of judgment interest is served in this case by allowing interest on each discrete claim from the time it was first reduced to judgment. One needs a good excuse to use another's money free of interest. The discrete claims in this case can be readily segregated, [3564] and no just reason appears for not segregating those that were reduced to judgment several years ago and have withstood appeals. See the Memorandum of December 29, 1978.

The question remains whether interest should run on the part of the judgment vacated by the Supreme Court ($5,194,617) from the time the component parts thereof were established by the jury's verdict and reduced to judgment on May 11, 1973, or

some five-and-one-half years later when the question of liability was returned to this court and decided without change in the amount of the verdict. I have concluded that the fair and proper course is to allow interest from the time the jury liquidated the amount due, and to consider the time the case has been on appeal as postjudgment time for the running of interest. The alternative, to treat the time on appeal as dead time, would give the defendant a windfall and would encourage greater delay and hardship on the plaintiff.

The motion for a new trial is more complicated. But because I have concluded that the plaintiff has made a proper case for the equitable tolling of the statute of limitations, as will be expressed in more detail shortly, it is not necessary to dwell at great length on the motion for a new trial. Suffice to say that if a higher court holds that I have erred on the equitable tolling question, there remain other good reasons to deny the motion for a new trial.

A careful reading of the instructions, together with the relevant parts of the transcript, convinces me that the jury was perfectly able to segregate the various periods of time, and to evaluate the kind and character [3565] of the defendant's antitrust behavior during each of the various periods of time. Each time period was clearly set apart in the testimony and in the exhibits. Each bit of challenged evidence that should have been received for a limited purpose was so limited when received. Moreover, the jury appeared to understand and apply the court's rulings and limitations on the use of evidence. Testimony challenged as irrelevant to later periods of time because it covered happenings during periods which the defendant asserted were time-barred was received. But limiting instructions were clear. The jury knew what evidence was being received for background purposes or for the purpose of establishing facts limited to claims arising out of the various times in question. There was no improper spill-over of evidence from one period to another.

The defendant cannot rewrite history: if the proof of some of the defendant's conduct is now embarrassing to the defendant, or seems to cast the defendant's behavior in an unfavorable light, it must be remembered that the defendant chose to behave as it did. The defendant was aware of the unfavorable inferences that might be drawn from its behavior toward Mt. Hood if the nature and extent of that conduct should become known. Indeed, one of the reasons for equitable tolling, in another context, is the calculated deception practiced by the defendant to keep the extent of some of its early misconduct from becoming known. The jury cannot be said to have been prejudiced by hearing the truth.

The challenged evidence was in most important respects uncontradicted. It was evidence of a continuing course of misconduct. Even if the jury heard about more [3566] misconduct, and about earlier misconduct than the statute of limitations would allow the jury to consider as causation in awarding damages, the evidence was useful background. One reason the special verdict form was employed was to help the jury keep the various time periods straight, and I am satisfied that the jury did its work properly.

Finally, on the matter of equitable tolling, factual elements work both ways. I am satisfied, however, that the equities preponderate in favor of the plaintiff. Not only did the plaintiff's attorneys believe prior to 1968 that the various proceedings pending before the Interstate Commerce Commission had preempted this litigation, but the doctrine of primary jurisdiction was supported by respectable Ninth Circuit precedent leading reasonable lawyers to believe that an action filed in the district court during the pendency of the ICC proceedings would have to be dismissed.

The Ninth Circuit, relying *inter alia* upon *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1931), and *Far East Conference v. United States*, 342 U.S. 570 (1951), had

only recently held that because courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Shipping Act in order to avoid the possibility of conflicts between the courts and the Maritime Commission, the district court had correctly dismissed an antitrust action when the same conduct complained of in the antitrust action was under investigation by the Maritime Commission. *Carnation Company v. Pacific Westbound Conference,* 336 F.2d 650 (9th Cir. 1964). That decision [3567] was reversed two years later by the Supreme Court. *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (1966). But in reversing, the Supreme Court did little to dispel the belief by most lawyers and judges that a regulatory agency with primary jurisdiction could, by taking a case, effectively preclude most actions in the district courts unless a plaintiff could show that the specific questions in suit fell outside the scope of the case pending before the agency. It must be remembered that during the years from 1964 to 1968 lower federal courts had not yet heard from the Supreme Court in *Hughes Tool Co. v. Transworld Airlines,* 409 U.S. 363 (1973). The realities of practicing law in the regulated carrier industry in the 1960s were that clients seeking cease-and-desist relief before the ICC were not encouraged by anything in the existing law to start an antitrust action against a regulated carrier if their action arose out of conduct that was debatably before the regulatory agency in pending regulatory proceedings.

By 1978, however, when the Supreme Court held that the statute of limitations was not tolled by the government's intervention in the regulatory proceedings filed in October, 1964, any opportunity for the plaintiff in this case to go back and start litigation over again had long since passed. It is interesting, but no doubt not very persuasive, to observe that as recently as 1977 several judges (this one and three appellate judges) still thought that the act of the United States Government in its intervention

in the ICC proceedings on behalf of Mt. Hood constituted the "functional equivalent" of the kind of justice department action that should have tolled [3568] the statute as a matter of law. It is small wonder that Mt. Hood's counsel and management did not know the statute was running on their antitrust claim.

The matter is resolved, for this court, by looking at the purpose of the antitrust law, the purpose of the statute of limitations, and the purpose of the doctrine of equitable tolling. To grant the doctrine of equitable tolling its effect in this case serves the legislative purposes of the antitrust laws. Equitable tolling also serves the purposes of primary jurisdiction and helps to avoid the confrontational problems that would arise if the same case had to run simultaneously in multiple tribunals. Finally, equitable tolling prevents injustice in this case. While I have studied most of the cases cited by the parties, I have had the most difficulty with Mr. Niskanen's statement (Tr., p. 3774) to the effect that he really hadn't thought of bringing an antitrust case until 1968 when he had in hand the result of the ICC proceedings. This statement can be interpreted as a case of an injured party waiting too long, or it can be interpreted as the thinking of a man who had been relying on his lawyers. Under all the circumstances of this case, the latter interpretation appears to be the most realistic, and the most reasonable.

Accordingly, I am filing herewith an amended judgment incorporating the decision of the court. The motion for a new trial is denied.

DATED January 26, 1979.

ALFRED T. GOODWIN
Alfred T. Goodwin, *Circuit Judge,*
Sitting by Designation [3569]

Appendix E

Statutes and Constitutional Provisions Involved

Section 4B of the Clayton Act, 15 U.S.C. § 15b, provides as follows:

> Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Section 5(i) of the Clayton Act, 15 U.S.C. § 16(i), provides as follows:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Amendment V to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII to the United States Constitution provides as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Appendix F

Authorities Demonstrating Inconsistency and Unpredictability in the Application of the Primary Jurisdiction Doctrine

1. Cases with apparently contradictory holdings:

   a. *Compare*

   Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 307 (1973) (holding Commodity Exchange Commission has primary jurisdiction because agency proceedings would be of "great help to the antitrust court");

   With

   Otter Tail Power Co. v. United States, 410 U.S. 366, 392-95 (1973) (Stewart, J., dissenting) (noting that under the *Ricci* criteria, the *Otter Tail* case was within the primary jurisdiction of the FPC).

   See K. Davis, Administrative Law of the Seventies (Supplementing Administrative Law Treatise) § 19.06 at 443 (1976) ("reconciling *Otter Tail* with *Ricci* seems rather difficult."); Note, *Primary Jurisdiction in Antitrust Cases: Three Recent Decisions*, 42 U. Cin. L. Rev. 725, 735 (1973) ("application of the three factors used in *Ricci* seems to require a different result [in *Otter Tail*].").

   b. *Compare*

   Rosado v. Wyman, 397 U.S. 397, 406 (1970) (primary jurisdiction inapplicable because there is no mechanism for petitioners to trigger and participate in HEW proceedings);

   With

   Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 312 (1973) (Marshall, J., dissenting) (criticizing majority for remanding petitioner to a procedure "which he has no power to invoke, [and] in which he has no right to participate if it is invoked").

   See W. Gellhorn & C. Byse, Administrative Law Cases and Comments, at 304 (6th ed. 1974).

c. *Compare*

United States v. Western Pac. R.R., 352 U.S. 59, 70-74 (1956) (holding that an administrative statute of limitations does not bar referral to the agency when the lawsuit was timely filed in the referring court);

With

Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 687 (1965) (noting the possibility that the administrative proceeding could be barred by a six-month statute of limitations).

d. *Compare*

S.S.W., Inc. v. Air Transport Ass'n of America, 191 F.2d 658, 664-65 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952) (primary jurisdiction with the CAB, despite fact that the CAB has no power to award damages);

With

Slick Airways, Inc. v. American Airlines, Inc., 107 F.Supp. 199, 214-18 (D. N.J. 1952), *cert. denied*, 346 U.S. 806 (1953) (CAB does not have primary jurisdiction because it has no power to award damages, expressly acknowledging the contrary result in *S.S.W.*).

See, H. Mitchell, *Primary Jurisdiction—What It is and What It is Not*, 13 ABA Section of Antitrust Law 26, 41 (1958); B. Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 Geo. L. J. 495, 503 (1953).

2. Cases where primary jurisdiction is found inapplicable, but where deference to the agency is nevertheless appropriate:

   a. *Rosado v. Wyman,* 397 U.S. 397, 406-07 (1970) (although holding that primary jurisdiction was inapplicable, the Court approved the trial court's efforts to learn the views of the HEW by requesting participation as either party or amicus).

   b. *City of Mishawaka, Ind. v. Ind. & Mich. Elec. Co.,* 560 F.2d 1314, 1322 (7th Cir. 1977), *cert. denied,* 436 U.S. 922 (1978) (even if the FPC does not have primary jurisdiction, "it may be that deferral to the Commission makes sense as a matter of judicial administration."); *see also City of Mishawaka v. American Elec. Power Co.,* 1980-1 CCH Trade Cases ¶ 63,193 at 77,934 (7th Cir. 1980).

   c. *Atchison, Topeka & S.F. Ry. Co. v. Aircoach Transport Ass'n, Inc.,* 253 F.2d 877, 885-86 (D.C. Cir. 1958).

   d. *United States v. Nat'l. Broadcasting Co.,* 1974-1 CCH Trade Cases ¶ 74,885 at 95,992 (C.D. Cal. 1973) (order denying applicability of primary jurisdiction, but planning "to give great weight to the FCC rules").

3. Cases and comments suggesting that an agency amicus brief might help the court decide on the applicability of primary jurisdiction, or might replace referral altogether:

   a. *Heat and Frost Insulators v. United Contractors Ass'n,* 383 F.2d 384 (3d Cir. 1973), *modified,* 494 F.2d 1353 (3d Cir. 1974) (after the NLRB filed an amicus brief indicating its prior resolution of all the issues raised by the com-

plaint which were within its primary jurisdiction, the court amended its opinion to eliminate referral to the NLRB as unnecessary).

b. *J. M. Huber Corp. v. Denman,* 367 F.2d 104, 111-12 (5th Cir. 1966) (before deciding whether to refer the matter to the FPC, the court obtained the FPC's position in an amicus brief and, based on that brief, the court referred the case to the FPC).

c. I P. Areeda & D. Turner, Antitrust Law ¶ 227b at 178 (1978) (in some cases "it might be preferable to proceed with an antitrust adjudication and seek an amicus brief from the regulators to resolve unfamiliar questions and gain insights into factual problems.").

d. L. Jaffe, *Primary Jurisdiction,* 77 Harv. L. Rev. 1037, 1047, 1049-50 (1964) (at 1047: "this whole costly merry-go-round could be avoided by calling upon the Commission to present its view to the court.").

e. K. Davis, Administrative Law Treatise § 10.02 at 14 n.41 (1958) (arguing that the Ninth Circuit erred when it required deferral after the CAB filed an amicus brief because that brief revealed the Board's position on the issues).

4. Cases where the agency probably has primary jurisdiction over the dispute but the court refuses to defer to the agency because of the delay involved:

a. *Sunflower Elec. Coop., Inc. v. Kansas Power & Light Co.,* No. 78-1188 (10th Cir. Aug. 6, 1979) (although referral to the F.E.R.C. appears "highly reasonable on its face," the delay involved constitutes "manifest injustice" to the plaintiff and compels the opposite result).

b. *Litton Systems, Inc. v. Am. Tel & Tel. Co.,* 1980-1 CCH Trade Cases ¶ 63,246 at 78,216 (S.D.N.Y. March 4, 1980) (no deferral because, among other reasons, substantial delay would result, which would "disserve the interests of justice").

c. *Seligson v. New York Produce Exchange,* 363 F.Supp. 338, 341 (S.D.N.Y. 1973) (in light of the delay involved and the court's view that the conduct is not arguably protected, "any doubt as to the applicability of the *Ricci* doctrine must be resolved on the side of allowing the plaintiff his day in court.").

See generally, Miss. Power & Light Co. v. United Gas Pipe Line, 532 F.2d 412, 419 (5th Cir. 1976), *cert. denied,* 429 U.S. 1094 (1977); B. Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants,* 41 Geo. L. J. 495 (1953).

5. Other unusual cases involving primary jurisdiction:

a. *S. W. Sugar Co. v. River Terminals Corp.,* 360 U.S. 411 (1959) (holding that the court should refuse to apply primary jurisdiction if judicial resolution of certain issues in the case would moot the need for administrative resolution of a different issue).

b. *Sunoco Energy Dev. Co. v. Burlington Northern Inc.,* 1980-1 CCH Trade Cases ¶ 63,196 at 77,946 (D. Wyo. Jan. 15, 1980) (where the court refrained from taking action for seven months to give the ICC a chance to act, without actually ordering the case referred; after seven months the court held that primary jurisdiction is not applicable).

Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

No.

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

79-1859

VS.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals (App. A to Petition), affirming the decision of the District Court (App. D to Petition), is reported at 616 F.2d 394.

STATUTES INVOLVED

Section 16 of the Clayton Act (15 U.S.C. § 26) and § 1981 of the Judicial Code (28 U.S.C. § 1981).

QUESTIONS PRESENTED

1. As this Court, the Ninth and Seventh Circuit Courts of Appeal, the District Courts of Oregon and Illinois and the Interstate Commerce Commission have all recognized, Greyhound pursued a deliberate program to destroy Mt.

Hood throughout the 1950's and 1960's.[1] Greyhound's cancellation of the joint through bus and severance of connections with Mt. Hood in July 1964 was the culmination of this destructive campaign. Title 15 U.S.C. § 26 prohibited Mt. Hood from seeking an injunction in the District Court against Greyhound's predatory behavior. Moreover, in 1964, the doctrine of primary jurisdiction as enunciated by this Court and the Ninth Circuit would have required a District Court to dismiss an action for damages pending disposition by the ICC of Mt. Hood's claims against Greyhound:

Was the statute of limitations properly tolled pursuant to the doctrine of equitable tolling when Mt. Hood commenced its action before the ICC (a) to prevent Greyhound's predatory conduct and (b) to invoke the ICC's primary jurisdiction to determine whether Greyhound's predatory conduct was approved and therefore exempt from the antitrust laws or was disapproved and therefore subject to the antitrust laws?

2. This Court has declared that a federal statute of limitations should be tolled if it will promote important

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[1] *Mt. Hood Stages, Inc., Petition for Modification—Greyhound Mergers* (Western Mergers), 104 MCC 449, 464 (1968); *Greyhound Lines, Inc. v. United States,* 301 F.Supp. 356 (N.D. Ill. 1969); *Greyhound Lines, Inc. v. United States,* 308 F.Supp. 1033 (N.D. Ill. 1970); *United States v. The Greyhound Corporation,* 363 F.Supp. 525 (N.D. Ill. 1973); *The Greyhound Corp. v. United States,* 370 F.Supp. 881 (N.D. Ill. 1974); *United States v. The Greyhound Corp.,* 508 F.2d 529 (7th Cir. 1974); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 1973-2 CCH Trade Cases, ¶ 74,824 (D. Ore. 1973); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 437 U.S. 322 (1978); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 1979-1 CCH Trade Cases, ¶ 62,446 (D. Ore. 1979); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 616 F.2d 394 (9th Cir. 1980) (App. A).

federal policies without frustrating the statute of limitations' policy of repose. Hence in every case in which equitable tolling has been invoked, the court sitting as chancellor—not a jury—decided whether equitable tolling should apply in accordance with this Court's standard:

Was it constitutionally proper for the lower court—rather than a jury—to decide the equitable tolling question?

3. The original judgment was entered on a jury verdict in May 1973. [R. 2248-9] Approximately one-third of that judgment depended upon tolling the statute of limitations as a result of (a) Greyhound's fraudulent concealment of its violations from 1953 to 1960 and (b) application of § 5(i) of the Clayton Act. In June 1978, this Court held that § 5(i) was not applicable but left intact that portion of the judgment for damages which accrued within the limitations period. This Court remanded the case for consideration of Mt. Hood's alternative equitable tolling claim. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 337 n. 21 (1978). On remand, the original judgment was reinstated in its entirety [R. 3570-71]:

Was the Court of Appeals correct in holding that Mt. Hood was entitled to recover interest from the date the original judgment was entered in May 1973?

4. Title 28 U.S.C. § 1961 provides that "interest shall be allowed on any money judgment in a civil case recovered in a district court." Section 4 of the Clayton Act (15 U.S.C. § 15) provides that a successful antitrust plaintiff shall recover "the costs of suit including a reasonable attorney's fee." Pursuant to those statutes, the District Court entered an amended judgment in December 1973, incorporating

the amount of the jury verdict and a reasonable attorney's fee [R. 3271-3]:

Is Mt. Hood entitled to interest on the entire "money judgment," including that portion of the judgment consisting of attorney's fees, as provided by law?

STATEMENT OF THE CASE

During the period 1947-54, Greyhound acquired control of eight bus companies which operated in the Pacific Northwest and had routes connecting with Mt. Hood. Mt. Hood protested those acquisitions in the Interstate Commerce Commission ("ICC") because Mt. Hood feared that if the acquisitions were approved, Greyhound could "longhaul" passengers around Mt. Hood's shorter bridge routes so as to deprive the public of the most convenient service and cause serious harm to Mt. Hood. In response to Mt. Hood's protests, Greyhound's top executives assured the ICC under oath that Greyhound would not longhaul passengers over its circuitous routes; that Greyhound would quote Mt. Hood's direct service and publish Mt. Hood's schedules in its folders; and that Greyhound would continue the joint through bus arrangement with Mt. Hood.[2] The Court of Appeals described what happened thereafter:

> "Relying upon Greyhound's representations, the Commission approved the acquisitions. After encircling Mt. Hood, Greyhound with the purpose of driving Mt. Hood out of business, did exactly what it represented to the Commission it would not do: Greyhound cancelled the through-bus connection, scheduled connecting services to preclude reasonable connection

[2] *Mt. Hood Stages, Inc.*, 104 MCC 449, 459-63 (1968), quoted in this Court's opinion, *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 325-26 (1978).

> with Mt. Hood, caused ticket agents to direct traffic over Greyhound's longer routes, and interfered with the distribution of Mt. Hood's schedules and the quotation of its rates and services." (App. A, p. 5)

Contrary to its assurances to the ICC, Greyhound broke connections with Mt. Hood on July 6, 1964. Because Mt. Hood was then surrounded by Greyhound and thus substantially dependent upon Greyhound for passengers, Greyhound's actions threatened imminent destruction of Mt. Hood's business. On October 7, 1964, after Greyhound had refused Mt. Hood's pleas to restore connections, Mt. Hood petitioned the ICC for injunctive relief.[3] The Antitrust Division of the Department of Justice intervened "to ensure the adequate consideration of the antitrust issues" raised by Mt. Hood's petition. [R. 1374] Following a trial in 1966-67, the ICC (Division Three) on April 5, 1968, affirmed the Hearing Examiner's report that Greyhound's practices constituted "destructive competition," were "not consistent with the public interest," were "inconsistent with the representations made in various [acquisition] proceedings" and "were inspired by a desire to stifle competition" and "injure or destroy Mt. Hood." *Mt. Hood Stages, Inc.*, 104 MCC 449, 459-63.

Promptly thereafter, on July 5, 1968, Mt. Hood commenced this action for damages.[4] [R. 1] As this Court and

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[3]Mt. Hood was precluded from seeking injunctive relief under the antitrust laws in a federal district court by reason of 15 U.S.C. § 26.

[4]While Mt. Hood was prosecuting this action, Greyhound was resisting the ICC's cease and desist orders. A three-judge District Court in Chicago affirmed the ICC's orders and granted the government's request for an injunction prohibiting Greyhound from continuing its predatory behavior. *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033 (N.D. Ill. 1970). Nonetheless, Greyhound

the Court of Appeals observed previously, the allegations in Mt. Hood's antitrust complaint and its ICC petition were essentially the same. 437 U.S. at 326-7:

> "Both claims rested upon the same conduct: [Greyhound's] acquiring encircling routes, canceling the joint through-bus and directing passengers over Greyhound's circuitous routes rather than Mt. Hood's direct route, all with the purpose and effect of eliminating Mt. Hood as a competitor." (App. A, p. 12)

On May 2, 1973, following a five week trial, the jury found that Greyhound's conduct violated §§ 1 and 2 of the Sherman Act and that Mt. Hood had sustained damages of $4,382,030 during the period January 1, 1953 to March 25, 1973. [R. 2248-49]

Prior to trial, the District Court ruled that § 5(i) of the Clayton Act (15 U.S.C. § 16(i)) had tolled the period of limitations from December 14, 1964, the date the Department of Justice intervened in the ICC proceeding. [R. 1354-57] After trial, on the basis of special interrogatories posed to the jury, the District Court also held the statute of limitations had been tolled during the period January 1, 1953 to December 15, 1960 by reason of Greyhound's fraudulent concealment of its antitrust violations. [R. 2248-49] Thus Mt. Hood was permitted to recover damages sustained during the entire period of Greyhound's unlawful conduct.

"displayed a contemptuous reluctance to even commence compliance with the Court's order" and in June, 1973, the District Court in Chicago found Greyhound guilty of criminal and civil contempt for willful disobedience of the court's order. *United States v. Greyhound Corp.*, 363 F.Supp. 525, (N.D. Ill. 1973); 370 F.Supp. 881, 884 (N.D. Ill. 1973). The District Court's judgment was affirmed by the Seventh Circuit. *United States v. The Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974)

In opposition to Greyhound's motion for judgment NOV and for a new trial, Mt. Hood contended the doctrine of equitable tolling—in addition to § 5(i)—suspended the statute of limitations while Mt. Hood was prosecuting its claims against Greyhound before the ICC. [R. 2653-59] In denying Greyhound's motions, the District Court did not address the equitable tolling issue. [R. 2874-81] On appeal, the Ninth Circuit did not reach Mt. Hood's equitable tolling claim either since § 5(i) was deemed sufficient to toll the statute. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 701, n. 34 (9th Cir. 1977). Greyhound petitioned for certiorari and, with reference to equitable tolling, specifically requested this Court to "grant certiorari to afford the matter full consideration." (Reply Brief in Support of Petition for Writ of Certiorari, at p. 10) This Court granted certiorari and held that § 5(i) was not applicable, but declined to consider the equitable tolling issue: "[W]e see no compulsion—indeed, no justification—for our reaching this distinct issue." 437 U.S. at 337 n. 21.

On remand, the trial judge invited the parties to supplement the trial record with evidence relevant to the equitable tolling issue and requested that counsel make offers of proof. [R. 3342] Except for the conclusory declarations of two Greyhound lawyers speculating how they might have employed a different strategy in their defense of the ICC and court litigation, Greyhound made no such offers of proof. [R. 3392, 3396] Nor did Greyhound demand the issue be resolved by a jury. The trial judge was "satisfied that the record presently before [it] is adequate to answer any factual questions that remain to be decided in the equitable tolling issue" [R. 3469], "reviewed parts of the

transcript with some care" [R. 3470] and resolved that issue in favor of Mt. Hood. [R. 3563-9] A third amended judgment was entered in the same amount as the original judgment with interest on attorney's fees from the date they were awarded. [R. 3570-71] The District Court also denied Greyhound's second motion for a new trial. [R. 3569][5]

Acknowledging the long delay in the resolution of this action, the Court of Appeals heard oral argument after an expedited briefing schedule in May, 1979. Although only two questions had been remanded by the Court of Appeals for decision by the District Court [R. 3334-5], Greyhound raised five issues in the Court of Appeals. Chief Judge Browning and Circuit Judges Wright and Kennedy unanimously affirmed the trial judge in all respects. Greyhound now petitions this Court for a second writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION PROPERLY APPLIED THE EQUITABLE DOCTRINE OF TOLLING AS DEFINED BY THIS COURT

The Court of Appeals' decision—unanimously affirming the District Court's application of equitable tolling to the particular facts here—rests solidly upon Supreme Court precedent. This Court has recognized on several occasions that a statute of limitations should be tolled on equitable grounds if important federal policies will be

[5]Greyhound's first motion for a new trial was filed in 1973 and denied by the trial court [CT 2256-60; 2880]. That denial was affirmed on appeal. 555 F.2d 687. Certiorari was not sought on this issue in Greyhound's earlier petition to this Court, nor is it being sought now.

served without frustrating the statute of limitations' policy of repose. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 427 (1965), the seminal decision on this subject, prescribed the standard for the lower courts to follow in determining whether equitable tolling should apply: the courts must consider "the purposes and policies underlying the limitations provision, the Act itself, and the remedial scheme developed for the enforcement of rights given by the Act." Applying the *Burnett* standard, this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 556 (1974) held that an improper class action nonetheless tolled the statute of limitations for all purported class members because tolling fostered "efficiency and economy of litigation" in the federal courts. While tolling was denied in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975), this Court there declared the statute of limitations should be tolled whenever there is "a substantial body of relevant procedural law to guide the decision" and "a significant underlying federal policy that would have conflicted with a decision not to suspend the statute."

Both courts below applied the Supreme Court standard and found that, on the discrete facts of this case, tolling should apply. In accordance with *Burnett, American Pipe* and *Johnson*, the Court of Appeals carefully analyzed the "remedial scheme" developed by Congress and the Supreme Court for the orderly enforcement of the antitrust laws against carriers regulated by the Interstate Commerce Commission. That analysis revealed precisely what this Court in *Johnson* declared was a prerequisite to equitable tolling: "a substantial body of federal procedural law to

guide the decision" and "a significant underlying federal policy that would have conflicted with the decision not to suspend the statute." (421 U.S. at 466) That "federal procedural law" and "federal policy" deemed so important in *Johnson* are embodied in § 16 of the Clayton Act (15 U.S.C. § 26) and the Supreme Court doctrine of primary jurisdiction.

When Greyhound severed connections with Mt. Hood on July 6, 1964, threatening Mt. Hood with the destruction of its business, Mt. Hood had no choice of forum. It had to go to the ICC. It could not go to the District Court. As a matter of law, prior resort to the ICC was (1) essential to the preservation of Mt. Hood's business from destruction by Greyhound and (2) a condition precedent to the maintenance of Mt. Hood's subsequent court action for restitution. *First*: Section 16 of the Clayton Act prohibited Mt. Hood from obtaining a federal court injunction against Greyhound's antitrust violations.[6] The Court of Appeals recognized that "Mt. Hood could secure an order restraining Greyhound's predatory practices *only* by petitioning the ICC, as it did." (App. A, p. 9) *Second*: The doctrine of primary jurisdiction as enunciated by this Court and the Ninth Circuit in 1964—the year Mt. Hood had to act to preserve its business from destruction and preserve its damage claim from the limitations bar—mandated that a simultaneous damage action be dismissed. *Far East Con-*

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[6]The policy behind that statutory prohibition was stated by this Court in *Central Transfer Co. v. Terminal R. Assoc.*, 288 U.S. 469, 475 (1933): "Its obvious purpose is to preclude any interference by [court] injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission."

ference v. United States, 342 U.S. 570 (1952); *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), *Carnation Co. v. Pacific Westbound Conference*, 336 F.2d 650 (9th Cir. 1964), reversed, 383 U.S. 213 (1966).

Surely the statute of limitations should not run on an action that would be dismissed if brought. Yet that is the gravamen of Greyhound's petition for certiorari. A complaint for injunctive relief against Greyhound certainly would have been dismissed pursuant to 15 U.S.C. § 26. A complaint for damages against Greyhound, just as certainly, would have been dismissed pursuant to the doctrine of primary jurisdiction. In 1964, relying upon this Court's decisions in *Cunard* and *Far East*, the Ninth Circuit affirmed the dismissal of plaintiff's antitrust damage action pending agency determination of matters within its primary jurisdiction so as to avoid conflict between the regulatory and antitrust regimes. *Carnation, supra*, 336 F.2d 650.[7] In plain terms, the Ninth Circuit ruled the District Court "was without jurisdiction to proceed." 336 F.2d at 653 and 667 n. 32. See, *Segal v. A.T.&T.*, 606 F.2d 842, 845 (9th Cir. 1979). By commencing its ICC action in 1964 and not commencing a simultaneous damage action, Mt. Hood acted in accordance with governing law.

This twelve-year old case does not warrant another review by the Supreme Court. The Court of Appeals' deci-

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[7]See *Cunard, supra*, 284 U.S. at 481 ("a remedy *must* be sought from the commission *before* the jurisdiction of the courts could be invoked."); *Far East, supra*, 342 U.S. at 574 (agency had "*exclusive* preliminary jurisdiction" of the matter); *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 292 (1922) ("The preliminary determination *must* be made by the Commission; and not *until* this determination has been made can a court take jurisdiction of the controversy.") Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (administrative remedies must be exhausted prior to resort to the courts for judicial relief) (emphases added).

sion conscientiously applied this Court's equitable tolling precedents to the historical facts presented here. The ICC action adhered to the "remedial scheme developed for the enforcement of rights" as prescribed by *Burnett*. It promoted "litigative efficiency and economy" as certainly as did the improper class action in *American Pipe*. It complied with "the substantial body of relevant procedural law" deemed so important in *Johnson*. Greyhound might disagree with the lower court's exercise of its equity jurisdiction by applying the equitable doctrine of tolling to the particular facts presented to it.[8] But that cannot justify a writ of certiorari.

A. The Court of Appeals' Decision Accords With Johnson v. Railway Express Agency

Johnson recognized that a statute of limitations would be tolled by agency proceedings if some "body of federal procedural law" or "significant federal policy" would be served thereby. (421 U.S. at 466) Tolling was denied in *Johnson* because those considerations—clearly present here —were absent there. In *Johnson*, commencement and prosecution of an EEOC proceeding under Title VII "[were] not prerequisities for the institution of a § 1981 action." (421 U.S. at 460) Here, by virtue of primary jurisdiction law as it stood in 1964, Mt. Hood had to obtain favorable ICC rulings as a "prerequisite" to its later damage action.[9] In

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[8]As Chief Justice Burger declared on Greyhound's prior appeal: "The authority of a federal court, sitting as chancellor, to toll a statute of limitations on equitable grounds is a well established part of our jurisprudence." 437 U.S. at 338.

[9]See f.n. 7, *supra*. See Court's discussion in *Board of Regents v. Tomanio*, .. U.S. .. (decided May 19, 1980); see also *Pesola v. Inland Tool & Mfg., Inc.*, 423 F.Supp. 30, 32 n. 2 (E.D. Mich. 1976) (distinguishing *Johnson* and tolling a statute of limitations

Johnson, as this Court stressed repeatedly, Congress had conferred upon plaintiff a "valuable" choice between "separate, distinct and independent remedies." (421 U.S. at 460-61) Here, the ICC proceedings and the subsequent court action were not "independent" of each other but were, by virtue of primary jurisdiction law, clearly interdependent.[10] In *Johnson*, this Court observed the absence of a "positive preference" that plaintiff's Title VII administrative remedy be pursued before the commencement of his § 1981 remedy. (421 U.S. at 461) Here, the doctrine of primary jurisdiction evinced not merely a "positive preference" but a plain mandate that Mt. Hood obtain ICC rulings before prosecuting its damage action in federal court.

The Court of Appeals carefully measured the facts of this case against the *Johnson* yardstick and concluded that the requisites for tolling, absent in *Johnson*, were present here:

> "Clearly, Congress did not intend a suit under the antitrust laws to be an independent remedial alternative to a petition to the Commission under § 10 of the Interstate Commerce Act in the circumstances involved here. No injunction could have issued and no damages could have been awarded under the antitrust laws unless and until the Commission exercised its primary jurisdiction under the Interstate Commerce Act. The

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when union grievance procedure was "a *prerequisite* to the cause of action to be preserved by tolling."); *Strickland v. Johns-Manville International Corp.*, 461 F.Supp. 215, 218 (S.D. Tex. 1978).

[10]See *U.S. v. Western Pacific R. Co.*, 352 U.S. 59, 64 (1956) (facts determined by the ICC "serve as a premise for legal consequences to be judicially defined"). This interdependence was particularly evident here. The Court of Appeals repeatedly declared the ICC's prior disapproval of Greyhound's predatory conduct was "key to our determination that Greyhound's conduct was not immune from the antitrust laws." App. A, p. 13; 555 F.2d at 699.

> doctrine of primary jurisdiction provides the 'relevant federal procedural law to guide the decision to toll the limitations period'. The significant federal policy underlying that doctrine—affording the Commission an opportunity to discharge its functions in the area assigned to it for regulation without interference by courts exercising related jurisdiction under the antitrust laws—'would have conflicted with a decision not to suspend the running' of limitations." (App. A, p. 17)

The Court of Appeals also properly found that the statute of limitations' policy of repose was not frustrated. Greyhound could not assert that evidence was "lost" inasmuch as Greyhound fraudulently concealed its violations until 1964 [R.2248-9] and has been litigating those violations ever since. See *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). The Court of Appeals correctly found that both the factual and legal issues raised by the ICC action "provided Greyhound with notice of Mt. Hood's antitrust claims in all but the most technical sense." (App. A, p. 12). As this Court and the Court of Appeals recognized, both proceedings involved precisely the same factual allegations. 437 U.S. at 326; 555 F.2d at 691; App. A, p. 12. Similarly, both proceedings applied the antitrust laws to that conduct. The ICC informed Greyhound that "the antitrust laws . . . offer certain broad guidelines in determining this proceeding." 104 MCC 449 at 451.[11] The Court of Appeals likewise declared that

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[11]The ICC's obligation was particularly compelling here because 15 U.S.C. § 26 prohibited Mt. Hood from obtaining injunctive relief in a District Court. That prohibition, this Court held in *Denver & R.G.W.R. Co. v. United States*, 387 U.S. 485, 502 (1967), "underscores the ICC's responsibility to act when such [antitrust] violations are brought to its attention."

"antitrust issues were an appropriate part of the proceedings." 555 F.2d at 701. Indeed, Greyhound acknowledged the Justice Department intervened in the ICC action "to assure the adequate consideration of antitrust issues" [R. 1374], including the issue of antitrust immunity. [R. 2272] Hence, as the Court of Appeals recognized, Mt. Hood's ICC action for injunctive relief and its later court action for damages were essentially identical so as "to avoid the evil against which the statute of limitations was designed to protect." *Johnson, supra*, 421 U.S. at 467; see App. A, pp. 12-18.

B. The Court of Appeals' Decision Presents No Conflict With Decisions of the Second Circuit

The lower court's exercise of its equity powers to toll the statute of limitations here does not conflict with the decisions of the Second Circuit or any other Circuit Court of Appeals. The lower court's decision, like the Second Circuit decisions cited by Greyhound, merely represent the discrete application of equitable principles to the particular facts presented. Following this Court's remand, the Court of Appeals remanded to the District Court because application of equitable tolling "turns in large part upon questions of fact" and therefore initial review by the "trial judge fully familiar with the facts" was necessary. [R. 3334-5] Both the District Court (Circuit Judge Goodwin sitting by designation) and the Court of Appeals painstakingly weighed the facts and applied this Court's equitable tolling standards to those facts. The Second Circuit did no more.[12]

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[12]In *Meyer v. Frank*, 550 F.2d 726 (2nd Cir. 1977), *cert. denied*, 434 U.S. 830 (1977), the Court twice stated that its decision rested upon the facts and circumstances presented and proceeded to strike

That another court might decline to apply equitable tolling to the particular facts before it is of no possible significance here. What is significant is that numerous courts (the Second Circuit as well as other Courts of Appeal and District Courts) have frequently exercised their equity powers to suspend the statute of limitations "where the interests of justice require[d] vindication of plaintiff's rights." *Burnett, supra,* 380 U.S. at 428.[13] Chief Justice Burger recognized that the equitable tolling issue was for the lower court "sitting as a chancellor." 437 U.S. at 338-9. That the "chancellor" might exercise its equity discretion to toll or not toll the statute in any particular instance does not warrant review by this Court.[14]

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a balance between the policies of federalism and repose in light of plaintiff's conduct. 550 F.2d at 727 and 729-30. Although tolling was denied in *Williams v. Walsh*, 558 F.2d 667 (2nd Cir. 1977), the Court took pains to declare that "tolling may sometimes be necessary to prevent frustration of the policy of the substantive federal statute or, perhaps to advance the goals of federalism." 558 F.2d at 674. *Smith v. American President Lines, Ltd.*, 571 F.2d 102 (2nd Cir. 1978) similarly acknowledged that tolling is appropriate where, as here (due to 15 U.S.C. § 26 and the doctrine of primary jurisdiction), "plaintiff has in some extraordinary way been prevented from asserting his rights." 571 F.2d at 109.

[13]See, e.g., *Leigh v. McGuire*, 613 F.2d 380 (2nd Cir. 1979); *Billings v. Chicago, R.I. & P.R. Co.*, 581 F.2d 707 (8th Cir. 1978); *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 554 F.2d 381, 392 (10th Cir. 1977) (en banc); *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), aff'd by equally divided court, 434 U.S. 99 (1977); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975); *United States v. Woodbury*, 359 F.2d 370 (9th Cir. 1966); *Pesola, supra,* 423 F.Supp. 34.

[14]Moreover, the scope of appellate review on the equitable tolling issue is necessarily limited. Appellate courts will not disturb the findings of fact of a trial judge sitting in equity unless those findings of fact are "clearly erroneous." *United States v. E.I. duPont De Nemours & Co.*, 331 U.S. 377, 381 (1956)

C. The Court of Appeals' Decision Is Not in Conflict With Carnation Co. v. Pacific Westbound Conference

In looking to *Burnett, American Pipe* and *Johnson* for guidance with respect to the doctrine of equitable tolling, the Court of Appeals acted correctly. Those decisions represent the paramount authority on this issue. On the other hand, as the Court of Appeals ascertained from a search of this Court's records, the tolling issue was not before the Court in *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (1966): "Neither limitations nor tolling was mentioned in the petition for certiorari, the opposition or the briefs on the merits." (App. A, p. 20) While this Court ruled in *Carnation* that antitrust damage actions generally are subject to the statute of limitations and should therefore be stayed rather than dismissed pending agency rulings on matters within the agency's primary jurisdiction, it clearly did not decide—and was not asked to decide—whether and under what circumstances a court might toll the limitations statute pursuant to equitable principles.

Carnation is not only of no help to Greyhound; it further demonstrates why this case does not present a significant issue worthy of a second review by this Court. Mt. Hood had to act in 1964. The law which governed its actions then was stated in *Cunard, Far East, Great Northern* and the Ninth Circuit's decision in *Carnation.* The passing reference to the limitations statute in this Court's decision in *Carnation* did not come until two years later—1966—long after the fact. In applying equitable tolling, the lower courts properly judged the reasonableness of Mt. Hood's conduct by the law which governed it. It would not have been fair to do otherwise.

Mt. Hood was told in 1964 that the doors of the federal courts were closed to its claim for damages. *Carnation, supra,* 336 F.2d at 650, 653. See also *Segal v. A.T.&T.,* 606 F.2d 842, 845 (9th Cir. 1979) ("The law of our Circuit [in 1964] required the district court to dismiss an action within the primary jurisdiction of an agency rather than to retain jurisdiction over it.") This Court should not grant certiorari to consider Greyhound's contention that the statute of limitations ran on a damage action that would have been dismissed if brought. Nor should certiorari be granted to consider Greyhound's claim that Mt. Hood should have foreseen a change in the law two years later.

D. Greyhound's Other Contentions Do Not Warrant Review By This Court

Greyhound asserts that Mt. Hood proceeded "backwards" by going to the ICC first and that application of equitable tolling to Mt. Hood's ICC action therefore "frustrates" the doctrine of primary jurisdiction. This claim is likewise undeserving of the Court's review. In 1964, when Mt. Hood was at the brink of destruction by Greyhound, the "remedial scheme" reflected in 15 U.S.C. § 26 and the doctrine of primary jurisdiction literally barred Mt. Hood's access to the District Court. See *Segal, supra,* 606 F.2d at 845. For Mt. Hood to have sought help from the only forum then open to it was not to proceed "backwards". Greyhound surmises that its antitrust immunity claim would have been resolved by the lower courts more expeditiously had Mt. Hood requested the District Court to refer specific antitrust issues to the

ICC for consideration. But the lower courts' decisions proved the contrary. Both the District Court and the Court of Appeals relied heavily upon the ICC's disapproval of Greyhound's conduct as "destructive competition" in rejecting Greyhound's claim of antitrust immunity. It is thus frivolous of Greyhound to assert that "the ICC was never even asked the question it should have answered to help the antitrust court do its job." (Petition at p. 17) Chief Judge Browning declared in Greyhound's prior appeal: "The successful resolution of these issues [by the ICC] was critical to the defeat of Greyhound's claim of antitrust immunity." 555 F.2d at 699. Contrary to Greyhound's accusation, the ICC furnished the lower court precisely what it needed "to help the antitrust court do its job." See *Western Pacific, supra,* 352 U.S. at 64. That Greyhound doggedly litigated its antitrust immunity claim "for nearly 10 years" thereafter cannot be blamed upon Mt. Hood's prior resort to the ICC. It was due to Greyhound's tenacity alone.

Finally, Greyhound's alarmist cry that "confusion" will result from the application of tolling here should be disregarded. If Greyhound is suggesting that a trial judge sitting in equity lacks discretion to toll a statute of limitations in "the interests of justice" (*Burnett,* 380 U.S. at 428), it is wrong. The broad equity discretion vested in the trial judge cannot be denied. *Burnett, supra; American Pipe, supra,* 414 U.S. at 559 (reiterating "the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose."); *Glus v. Brooklyn Eastern Terminal,* 359 U.S. 231 (1959); *Holmberg v. Armbrecht,*

327 U.S. 392 (1946). Equitable tolling, like fraudulent concealment tolling (*Holmberg*) or estoppel tolling (*Glus*), turns on a case by case analysis of the facts in accordance with "considerations deeply rooted in our jurisprudence" (*American Pipe, supra,* 414 U.S. at 559) and does not cause any greater "confusion" or "uncertainty" regarding the statute of limitations.

Greyhound's first petition for certiorari requested this Court to give Mt. Hood's equitable tolling claim "full consideration." The Court saw "no justification" to do so then. 437 U.S. at 337 n. 21. There is no justification to do so now.

II. THE COURT OF APPEALS' DECISION DID NOT VIOLATE GREYHOUND'S CONSTITUTIONAL RIGHTS

Greyhound's demand for a jury trial of the equitable tolling issue comes late and with no support. The application of equitable tolling to prior court or agency proceedings has never been treated as a jury issue. In all of the tolling decisions cited by Mt. Hood and Greyhound, it was within "the authority of a federal court sitting as chancellor" to decide whether "to toll a statute of limitations on equitable grounds." This procedure was described by Chief Justice Burger "as a well established part of our jurisprudence." 437 U.S. at 338. There is good reason for this. First, equity issues are traditionally decided by the court, even within the context of a damage action.[15] Second, application of tolling here turned upon the resolution of

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[15]See *Ross v. Bernhart,* 396 U.S. 531, 538 (1970) ("The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."); *West v. Devitt,* 311 F.2d 787, 788 (8th Cir. 1963) (no right to jury trial of laches defense to damage claims); *Dawson v. Contractors Transport Corp.,* 467 F.2d 727, 733 (D.C. Cir. 1972) (no jury trial on equitable cross-claim for contribution in negligence action).

policy questions delineated in *Burnett, American Pipe* and *Johnson* which fall outside the jury's province.[16]

Moreover, Greyhound's demand for a jury trial with respect to equitable tolling was abandoned by Greyhound long ago. Greyhound previously requested the District Court, the Court of Appeals and this Court to reject Mt. Hood's equitable tolling claim—on the merits—without benefit of a jury. Now that equitable tolling has been applied by the Court, Greyhound wants a jury.

This Court should not grant certiorari to review contentions not pressed below. Greyhound's Fifth Amendment "due process" claim nowhere appears in the record below and its Seventh Amendment "jury trial" claim did not surface until long after this Court's prior remand. [R. 3376] Even then, it was given cursory five-line treatment in Greyhound's briefs to the lower courts. [R. 3376; Appellants' Opening brief, p. 18] No supporting authority was given. Now, in the hope that a "constitutional issue" might trigger certiorari, Greyhound's jury trial demand has belatedly assumed prominence in their latest petition. It is this pen-

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[16]Thus whether the "remedial scheme" (*Burnett, supra,* 380 U.S. at 427) reflected in § 16 of the Clayton Act and the Supreme Court doctrine of primary jurisdiction (particularly as it existed in 1964) required Mt. Hood to go to the ICC before commencing a court action for damages was a legal question which a jury could not be expected to decide. Likewise, whether the ICC action and the court action presented essentially the same issues regarding the same predatory conduct so as to charge Greyhound with constructive notice (if not actual notice) of Mt. Hood's antitrust claims was a legal question which a jury could not be expected to decide. Finally, whether tolling would be "consonant with the legislative scheme" (*American Pipe, supra,* 414 U.S. at 558) or whether there was "a substantial body of federal procedural law" and "a significant federal policy that would have conflicted with a decision not to suspend the statute" (*Johnson, supra,* 421 U.S. at 466) were policy questions which a jury could not be expected to decide.

chant for raising defenses in piecemeal fashion that has enabled Greyhound to enjoy its "day in court" many times over. Since 1964, Greyhound's behavior has been reviewed and condemned repeatedly by six federal tribunals (see footnote 1, *supra*), rendering further review by this Court superfluous.

III. THE INTEREST QUESTIONS RAISED BY GREYHOUND ARE NOT WORTHY OF CERTIORARI

A. The Court of Appeals Properly Awarded Interest from the Date of the Original Judgment

Following remand, the District Court allowed interest at Oregon's statutory rate of 6%[17] to accrue from the date of Mt. Hood's original judgment. Not content to have reaped the substantial benefit from the use of Mt. Hood's money for seven years at an interest rate far below prevailing levels, Greyhound asked the Court of Appeals to compound the injustice by depriving Mt. Hood of all interest on its judgment—including the portion unaffected by the ruling of this Court in the first appeal—from 1973 until 1979 when the third amended judgment was entered by the District Court. [R. 3570-71] Relying upon sound precedent,[18] the Court of Appeals rejected Greyhound's request that Mt. Hood be denied interest on its judgment. (App. A, pp. 23-5)

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[17]Oregon Revised Statutes 82.010.

[18]*Lew Wenzel & Co. v. London Litho Supply Co.*, 563 F.2d 1367, 1369 (9th Cir. 1977); *Perkins v. Standard Oil Co.*, 487 F.2d 672, 674-6 (9th Cir. 1973). The failure of this Court to specifically award interest did not preclude consideration of that issue by the lower courts. *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970) ("our failure to make explicit mention in the mandate of attorney's fees simply left the matter open for consideration by the District Court, to which the mandate was directed."); *Kneeland v. American Loan and Trust Co.*, 138 U.S. 509, 511 (1891).

That holding is undeniably just and accords with a mass of authority.[19]

As the Court of Appeals recognized, the present judgment and the judgment previously vacated by this Court are "in the same amount for the same damages incurred during the same period. The only change is the rationale for tolling for a portion" of the judgment. (App. A p. 24) Hence the cases cited by Greyhound are readily distinguishable. *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3538 (1980) and *Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir. 1977) both involved remand proceedings that required additional fact-finding and entry of *new* judgments. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 354 (1948) was concerned only with the power of appellate courts to interpret and enforce their mandates; it did not address the availability of interest on judgments altered on appeal.[20] The decision below creates no significant conflict in need of resolution by this Court.

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[19]*Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 845-847 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3556 (1979); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 429 (5th Cir. 1978); *City of Detroit v. Grinnell Corp.*, 575 F.2d 1009, 1010 (2d Cir. 1978); *Inland Credit Corp. v. M/T Bow Egret*, 556 F.2d 756, 758 (5th Cir. 1977); *Skou v. United States*, 526 F.2d 293, 300 (5th Cir. 1976); *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 509 F.2d 784, 789 (5th Cir. 1975); *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-877 (1st Cir. 1971); *Premier Corp. v. Serrano*, 471 F.Supp 444, 445-6 (S.D. Fla. 1979); *Feldman v. Allegheny Airlines, Inc.*, 452 F.Supp. 151, 153 (D.Conn. 1976); *Mascuilli v. United States*, 383 F.Supp. 50, 52-53 (E.D. Pa. 1974).

[20]Also, unlike the plaintiff in *Briggs*, Mt. Hood requested the Court of Appeals to modify its mandate on remand to expressly authorize the award of interest from the date of the original judgment and, unlike the Court of Appeals in *Briggs*, the court below ruled that such interest should be awarded. (Brief of Appellee, p. 58-9).

B. The Court of Appeals Properly Awarded Interest on Attorney's Fees

Greyhound's request for certiorari with respect to the lower court's award of interest on the entire judgment, including that portion of the judgment which consists of attorney's fees, should likewise be denied. Even if Greyhound's claims were otherwise deserving of this Court's review, it was apparently not worthy of Greyhound's attention on its prior appeals. The District Court's judgment dated December 21, 1973 expressly provided the award of attorney's fees would bear interest. [R. 3273] While Greyhound unsuccessfully appealed the amount of those fees, it did not question the lower court's award of interest thereon. To allow Greyhound to raise that question on its second appeal, having failed to do so on its first appeal six years ago, would reward Greyhound's efforts to prolong this litigation and would exacerbate the resultant injury to Mt. Hood.

Nor does Greyhound's contention have merit even if it had not been waived. The only authority cited in *Carpa, Inc. v. Ward Foods Inc.*, 567 F.2d 1316 (5th Cir. 1978) (upon which Greyhound relies) for its denial of interest on attorney's fees was an earlier diversity case applying Texas law, even though it recognized that accrual of interest in federal question cases is controlled by federal law. 567 F.2d at 1322. Section 1981 governs interest on "money judgments," not "costs" or "damages". The Court of Appeals was therefore correct in following *Perkins v. Standard Oil Company of California*, 487 F.2d 672, 675 (9th Cir. 1973) for, as it explained in *Perkins*, "once a judgment is obtained, interest thereon is mandatory with-

out regard to the elements of which that judgment is composed." This is the only reasonable construction of § 1981 of the Judicial Code and has therefore led many other courts to allow interest on awards of attorney's fees. E.g., *Lew Wenzel & Co., etc. v. London Litho Supply Co., Inc., supra,* 563 F.2d at 1369; *City of Detroit v. Grinnell Corp., supra,* 575 F.2d at 1010; *Ramey v. Cincinnati Enquirer, Inc.* 508 F.2d 1188, 1198 (6th Cir. 1974); *Harris v. Chicago Great Western Ry.*, 197 F.2d 829, 836 (7th Cir. 1952). *Carpa* is a mere aberration, contrary to the weight of authority on a trivial issue, and does not warrant a second writ of certiorari by this Court.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Dated: May 29, 1980.

Respectfully submitted,
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(Appendix follows)

STATUTES

Section 16 of the Clayton Act (15 U.S.C. § 26) provides:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing here contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

Section 1961 of the Judicial Code (28 U.S.C. § 1961) provides:

"Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."

JUN 10 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1859

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

As it has throughout this litigation, Mt. Hood devotes much of its Brief in Opposition ("Br. Opp.") to reviling Greyhound. Obviously Mt. Hood seeks to persuade this Court that Greyhound is evil, that it deserves whatever it gets and that the Court should ignore the important questions of law and policy this case presents. That stratagem failed the last time Mt. Hood tried it with this Court, and it even more clearly deserves to fail this time.[1]

1. The stratagem includes distortions of the record and even of this Court's prior action. For example, apparently in an attempt to make the Court believe that it has already denied certiorari on the "equitable tolling" issues, Mt. Hood states that Greyhound previously sought certiorari on them but that this Court declined to decide them. (Br. Opp., pp. 7, 20) That is false. In truth, when the case was last before the Court, neither the District Court nor the Court of Appeals had even considered those issues, and obviously Greyhound did not seek certiorari on them. (Petition, No. 77-598, pp. 2-4) It was Mt. Hood that sought affirmance on its equitable tolling claim; Greyhound merely pointed out that the Court should not allow the result below to stand on the basis of that novel claim without considering it on its merits. (Reply Br. in Support of Petition, No. 77-598, p. 10) The same is true now.

Nothing Mt. Hood says can alter the fact that the Court of Appeals has tolled the statute of limitations in circumstances and on stated grounds that have never before been held to justify tolling. The decision below is inconsistent with this Court's prior decisions on tolling, and it has implications far beyond this case because it creates a new tolling exception which, if left standing, will apply to countless antitrust cases. This Court should consider that rule now.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

I. The Court Should Review and Reverse the Court of Appeals' Decision to Toll the Statute of Limitations.

A. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN BOARD OF REGENTS V. TOMANIO, 48 U.S.L.W. 4556 (MAY 19, 1980).

Board of Regents is the Court's latest word on tolling. It again holds that the statute of limitations is not tolled by the pendency of a prior proceeding which attacks the same conduct. Mt. Hood's relegation of that important decision to a brief footnote reference (Br. Opp., p. 12 n.9) cannot obscure that *Board of Regents* reaffirms principles which are diametrically opposed to those on which the decision below rests, and effectively repudiates most of the arguments Mt. Hood makes in opposition to the petition.

First, *Board of Regents* reiterates the "fundamental" nature of statutes of limitations and that they "are more than a technical obstacle to be circumvented if possible." 48 U.S.L.W. at 4559, 4558. By treating Mt. Hood's failure to file its antitrust complaint within the limitations period as a mere "technical omission" (Petition, App. A, p. 11), the decision below takes precisely the opposite approach.

Second, *Board of Regents* holds that tolling is a question of statutory construction, and that where a statutory limitations scheme includes coordinate tolling rules, courts normally are not free to interfere and create new tolling rules based on policy considerations. 48 U.S.L.W. at 4559-60. Sections 4B and 5(i) of the Clayton Act, 15 U.S.C. §§ 15b, 16(i), constitute a limitations

scheme with integrated tolling rules designed to avoid uncertainty and "undue prolongation" of private antitrust actions. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 335 (1978). Congress considered and specified what prior proceedings toll the antitrust statute of limitations, and the ICC proceeding here involved does not meet Congress' specific tolling requirements. By holding that the ICC proceeding nevertheless tolls the statute, the Court of Appeals has once again overridden Congress' language and intent with its own views of policy, and its decision therefore conflicts with the principles of statutory construction set forth in *Board of Regents*.[2]

Third, *Board of Regents* rejects the central core of the Court of Appeals' and Mt. Hood's efforts to distinguish *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and *Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976). The Court of Appeals concludes that because courts sometimes refer issues to the primary jurisdiction of administrative agencies, Mt. Hood's ICC and antitrust remedies were "interdependent", and thus Congress intended a prior administrative proceeding to toll the antitrust statute of limitations. (Petition, App. A, pp. 17-18) But *Board of Regents* holds that, for tolling purposes, remedies are "independent" if they have separate legal origins and the pursuit of one is not an express prerequisite to commencing an action to enforce the other. 48 U.S.L.W. at 4559-60. As the Court explained and held:

> "Unless [a federal] remedy is structured to require previous resort to state proceedings, so that the claim may not even

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2. The decision below is based upon the Court of Appeals' policy conclusion that a failure to toll the statute would conflict with the purpose of the primary jurisdiction doctrine to afford the agency an opportunity to decide regulatory issues before the courts decide antitrust issues. (Petition, App. A, p. 17) That conclusion rests on inconsistent assumptions. (Petition, pp. 15-16) But even if it were correct, that conclusion can no more justify tolling than could the similar conclusion in *Board of Regents* that tolling would further the policies of federalism and abstention by permitting state courts to resolve state law questions before federal courts addressed constitutional issues. *Compare* 48 U.S.L.W. at 4560 *with* 48 U.S.L.W. at 4561 (Brennan, J. dissenting).

> be maintained in federal court unless such resort be had [citation omitted], it cannot be assumed that Congress wishes to hold open the independent federal remedy during any period of time necessary to pursue alternate state-court remedies." 48 U.S.L.W. at 4560.

It is indisputable that Mt. Hood's ICC and antitrust remedies had independent legal origins,[3] and despite Mt. Hood's argument (Br. Opp., p. 10)—which the decision below does not adopt—it is clear that pursuit of its ICC remedy was not a prerequisite to the maintenance of its antitrust claim in federal court. (pp. 5-6, below)

Board of Regents makes it clear that the decision below cannot stand. *See McGuire v. Leigh,* 48 U.S.L.W. 3767 (May 27, 1980).

B. MT. HOOD'S RESPONSE DEMONSTRATES THE NEED FOR THIS COURT TO REVIEW THE DECISION BELOW.

Mt. Hood cannot deny either that the decision below fails to follow the complete identity requirement of *Johnson* and *Electrical Workers* or that it is irreconcilable with the language of *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (1966) and *United States v. Michigan National Corp.,* 419 U.S. 1 (1974).[4] Instead, Mt. Hood defends the decision below by a new theory of its own. Mt. Hood argues that tolling is proper here because when it commenced its ICC proceeding it "could not go to the District Court" and therefore "had no choice of forum". (Br. Opp., p. 10) Mt. Hood would have this Court believe that in going to the ICC

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3. Mt. Hood's ICC petition was brought under Section 5(10) (formerly Section 5(9)) of the Interstate Commerce Act, 49 U.S.C. § 5(10), to determine the extent of the Greyhound's obligations arising out of the ICC's acquisition approvals and to enforce the national transportation policy. This antitrust case was brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, for alleged monopolization, attemped monopolization and restraint of trade. Mt. Hood agrees. It says that "the legal ingredients of [its] case (antitrust standards) and those to be applied by the ICC (regulatory standards) *are radically different.*" (R. 210) (emphasis added)

4. Mt. Hood does repeat the Court of Appeals' error of stating that limitations was not involved in *Carnation* (Br. Opp., p. 17), but that is wrong. (Petition, p. 9, n.4)

first it was relying on Ninth Circuit precedent and the governing law with respect to injunctive relief. (Br. Opp., pp. 10-11, 13, 17-18)

But the decision below cannot be justified by reference to Mt. Hood's belief as to whether it could independently pursue its ICC and antitrust remedies. The Court of Appeals expressly rejected that approach, holding Mt. Hood's state of mind on the question to be irrelevant. (Petition, App. A, p. 23). Instead, the Court of Appeals adopted a sweeping new tolling theory that is applicable to any antitrust case which raises questions arguably within an agency's primary jurisdiction. Mt. Hood's defense of a decision which was not rendered cannot affect the need for this Court to review the decision which was.

Similarly, Mt. Hood's assertion that its ICC proceeding was a " 'prerequisite' to its later damage action" (Br. Opp., p. 12) is plainly incorrect. It was not prerequisite in any factual sense because Mt. Hood did not rely on its perceptions of the applicable law in going to the ICC.[5] Nor was it prerequisite in any legal sense. Plaintiffs have always filed antitrust complaints against regulated businesses without first going to an administrative agency.

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5. Mt. Hood did not even consult an attorney about a private antitrust case against Greyhound until 1968 (Tr. 3774), and Mt. Hood's lawyers did not even think up their current reliance excuse until their brief to this Court in 1978. Prior to that Mt. Hood took precisely the opposite position: that it did have its choice of forum, that its complaint did *not* involve matters within the ICC's primary jurisdiction, and that the injunctive relief it most needed could be obtained only from the court. (Petition, p. 18; R. 1, 9-10, 247, 250-51, 1127-29) Moreover, the Ninth Circuit's *Carnation* decision was in effect only from July 1964 to February 1966, and that is the only period during which Mt. Hood could be excused from filing its complaint even under its theory. But three and one-half years of the statute had run before *Carnation* was decided by the Ninth Circuit, and thus Mt. Hood had only six months within which to file after *Carnation* was reversed. Instead Mt. Hood waited an additional two and one-half years before bringing this action, and therefore its pre-1964 claims are time-barred, even if it did rely on *Carnation* and even if that reliance did toll the statute. Thus tolling here does not depend on a plaintiff's reliance on an erroneous decision. Instead, tolling has been permitted where Mt. Hood was aware of its claims but simply did not consider bringing a lawsuit until the statute of limitations had extinguished some of them. That is sleeping on one's rights.

Indeed, the doctrine of primary jurisdiction would never have been developed if that was not the normal and expected way to proceed. That is also the way which sound public policy requires plaintiffs to proceed, regardless of whether a court dismisses or stays a complaint raising primary jurisdiction issues, because it is the only way in which the antitrust court, instead of the plaintiff, can determine whether exercise of an agency's primary jurisdiction is appropriate and, if so, with respect to what issues.

In short, Mt. Hood's damage remedy could be obtained from the court (and only the court), and like any other antitrust plaintiff, Mt. Hood was free to file its complaint any time after it learned of its claims in 1960. (R. 2249) In no way did either the availability of independent administrative remedies or the Ninth Circuit's erroneous decision in *Carnation* three and a half years later, prevent it from taking that minimal step to preserve its pre-1964 claims. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975).

Finally, Mt. Hood argues that the Court of Appeals' new tolling rule will not create uncertainty because courts frequently exercise their equity powers to toll limitations periods. (Br. Opp., pp. 16, 19-20) But the lower court cases Mt. Hood cites announce no such general rule,[6] and the prior decisions of this Court establish that tolling can occur only pursuant to specific standards capable of certain and predictable application. (Petition, pp. 13-14) The primary jurisdiction doctrine is not composed of certain legal standards, and Mt. Hood fails to explain how, sixteen years after the fact, that uncertain doctrine can be applied with certainty to a complaint that never was filed. (Petition, pp. 17-20)

The decision below does not advance the doctrine of primary jurisdiction but defeats it. It is contrary to Congress' intent in

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6. Mt. Hood's cases (Br. Opp., p. 16 n.13) either have been reversed (*Leigh*); involved exactly the same cause of action (*Billings, Woodbury*); involved situations where pursuit of the prior proceeding was required (*Strickland, Pesola*); or involved defendant's acts of concealment (*Dartt, Reeb*). In one case, *Ashland Oil,* the issue was not discussed.

adopting an integrated limitations scheme. It fails to apply the Court's prior tolling decisions. If permitted to stand it will mean that a different limitations rule applies to corporate antitrust plaintiffs seeking multiple damages than to victims of racial discrimination and other unconstitutional conduct. The Court should grant the petition for certiorari, establish that the same legal principles apply to this case as to others, and reverse the decision below before it spawns a new and undesirable antitrust tolling rule.

II. The Court Should Review the Constitutional Issues.

The Court of Appeals' decision to toll the statute rests in part on its own resolution of facts as to which Greyhound had neither notice nor an opportunity to be heard. (Petition, pp. 21-24) Mt. Hood says that the deprivation of Greyhound's rights may be excused because Greyhound previously argued that Mt. Hood's tolling theory was invalid as a matter of law. (Br. Opp., p. 21) But, prior to the decision below, the lower courts had not adopted a non-statutory tolling theory, and Greyhound had no reason to assume that they would adopt an unprecedented rule which was inconsistent with constitutional rights.

Mt. Hood also argues that in other tolling cases the issue was decided by the court, not the jury. (Br. Opp., pp. 20-21) But those other decisions found tolling as a matter of law; they did not turn on the resolution of questions of fact. (Petition, pp. 10-11, 21) Here the Court of Appeals' decision rests both on policy (primary jurisdiction) and factual findings (adequacy of notice). As is the case with fraudulent concealment, the factual questions necessary to tolling should have been the subject of trial and should have been tried to the jury.[7] (Petition, p. 23)

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7. Mt. Hood's argument that the decision below turns not upon facts, but only upon "policy questions" (Br. Opp., pp. 20-21) is inconsistent with its earlier arguments which attempted to justify the decision below on the ground that it did turn on questions of fact, such as the "reasonableness of Mt. Hood's conduct" which it says the lower courts "painstakingly weighed". (Br. Opp., pp. 15-17) Mt. Hood cannot have it both ways.

III. The Court Should Review the Interest Questions.

A. THE PREJUDGMENT INTEREST ISSUE IS SUBSTANTIAL.

Mt. Hood's response to the demonstration that the decision below conflicts with decisions of this Court and of two other courts of appeals (Petition, pp. 24-25) is to misstate Greyhound's position. Greyhound does not "request that Mt. Hood be denied interest on its judgment". (Br. Opp., p. 22) Greyhound argues only that, consistent with the Court's prior decisions, Mt. Hood cannot be awarded interest on a vacated judgment. The conflict in decisions cannot be wished away, and the very number of cases cited by Mt. Hood shows that the subject is controversial and that the law is unclear.

B. THE ATTORNEYS' FEES INTEREST QUESTION SHOULD BE RESOLVED BY THIS COURT.

Mt. Hood admits that the decision below squarely conflicts with *Carpa, Inc. v. Ward Foods, Inc.*, 568 F.2d 1316 (5th Cir. 1978).[8] The issue is not "trivial" (Br. Opp., p. 25) because it is present in every antitrust case in which a plaintiff prevails.

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8. Mt. Hood says that *Carpa* is a "mere aberration" (Br. Opp., p. 25), but the cases it cites either did not arise under 15 U.S.C. § 15 or are cases ending in settlements which provide for interest on attorneys' fees.

CONCLUSION

The decision below is bad law and bad policy and its ramifications are alarming. The need for this Court's guidance is clear. The Petition should be granted.

Respectfully submitted,

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